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This report was prepared for the Institute by Professor Rod Wood during his secondment to the Institute from the Faculty of Law at the University of Alberta. Professor Wood has a significant background in commercial law matters, including preparation of a handbook on the operation of the Personal Property Security Act. The Institute was fortunate to have the benefits of Professor Wood's expertise in guiding the Board to the suggestions made in this paper. His thorough knowledge of the area and the comprehensiveness of his research have greatly assisted in the policy decisions represented in the report.

PREFACE AND INVITATION TO COMMENT

This is not a final report. It is a report of our conclusions and proposals. The Institute's purpose in issuing a Report for Discussion at this time is to allow interested persons the opportunity to consider these tentative conclusions and proposals and to make their views known to the Institute. Any comments sent to the Institute will be considered when the Institute determines what final recommendation, if any, it will make to the Alberta Attorney-General.

The reader's attention is drawn to the List of Recommendations in Part III and to the Draft Legislation in Part IV. It would be helpful if comments would refer to these recommendations where practicable, but commentators should feel free to address any issues as they see fit.

It is just as important for interested persons to advise the Institute that they approve the proposals as it is to advise the Institute that they object to them, or that they believe that they need to be revised in whole or in part. The Institute often substantially revises tentative conclusions as a result of comments it receives. The proposals do not have the final approval of the Institute's Board of Directors. They have not been adopted, even provisionally, by the Alberta government.

Comments on this report should be in the Institute's hands by the end of February, 1993. Comments in writing are preferred.

93-00972/

REPORT ON LIENS

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PART I — SUMMARY OF REPORT

Introduction

This Report for Discussion proposes a major reformulation to the law of liens in Alberta. We propose that the law governing liens in personal property be codified in a single statute. The statute would define the nature and extent of the lien and set out the steps needed to protect the lien against claims of third parties. The statute would provide a set of priority rules for determining contests between a lien claimant and other third parties who claim an interest in the goods subject to a lien. The statute would also provide a uniform set of rules regulating the remedies of the lien claimant.

One of the most significant changes that we propose involves the expansion of the registration option. At present, most liens are lost if the goods are surrendered to the debtor. However, the Garagemen's Lien Act creates a non-possessory lien in favour of certain claimants. In order to take the benefit of this lien, the lien claimant must register the lien. We propose that a similar approach be extended to all classes of liens. Other major features of the proposed reform are summarized below.

Nature and Extent of the Lien

The proposed statute would identify the classes of claimants who are entitled to a lien and the goods which are subject to it. A lien would be enforceable against a debtor or a third party only if the lien claimant has possession of the goods or if the lien claimant has obtained a written acknowledgment of indebtedness from the debtor. A lien could be claimed only against goods that belonged to the debtor.

Priority of the Lien

A lien claimant would lose priority to competing third parties unless the lien claimant perfected the lien by taking possession of the goods or by registering the lien. The legislation would set out a comprehensive set of priority rules which would determine the ranking of the lien against buyers, secured creditors and other claimants.

Registration of the Lien

Registration of the lien would be accomplished by filing a financing statement at the Personal Property Registry. The registration rules would be substantially the same as those governing the registration of a security interest. The registration would have a one year registration life and would be renewable for further periods of one year.

Enforcement of the Lien

The proposed statute would set out a detailed system governing the enforcement remedies of a lien claimant. These remedies would be similar to the remedies available to secured creditors under the Personal Property Security Act. A lien claimant would be permitted to sell the goods by private sale provided that it was conducted in a commercially reasonable manner.

PART II — REPORT

CHAPTER 1 — INTRODUCTION

A. Purpose of the Report

A person may agree to the future payment of money to another person in return for goods, services or money. In the usual case, a failure to pay the money when due gives the creditor the right to proceed against the debtor as an unsecured creditor. However, in certain cases the law confers a lien which gives the creditor the right to retain or seize property of the debtor in order to secure the amount owing. This right is typically restricted to the property in respect of which labour or services were rendered. In this respect, a lien functions in much the same way as a security interest. In both cases the creditor obtains a special right to proceed against the debtor's property in order to secure a debt. They differ in that a security interest is created by an agreement between the parties, while a lien arises by operation of law.

Major efforts have been made towards the reform of debtor-creditor law in Alberta. On October 1, 1990 the Personal Property Security Act came into force in Alberta. Its aim was to modernize and rationalize the law of security interests in personal property. On March 1991, the Alberta Law Reform Institute issued its Final Report on the Enforcement of Money Judgments which recommended sweeping changes to the judgment enforcement system. The law governing liens also requires comprehensive reform. A survey of the existing law indicates that it has been left in a neglected state. The law is characterized by piecemeal development, inconsistent design and many archaic and obsolete features. It is badly in need of a major overhaul.

B. Consultations

Four stages of consultation were undertaken in connection with this Report. In the first stage, comments concerning problems or suggestions for reform were sought. In the second stage, the Project Committee met and agreed upon the basic goals and direction of the reform project. In the third stage, a discussion paper, which contained a draft set of recommendations, was circulated on a limited basis in order to elicit feedback and constructive comment. In the fourth stage, the Project Committee reviewed the recommendations and draft legislation

in order to work out technical problems with the design of the system and to ensure that the system properly co-ordinated with the existing registry system.

Professor Wood was grateful to have the valuable assistance of Mr. Geoffrey Ho, Professor Peter Lown and Professor Michael Wylie as members of the Project Committee. The helpful comments of Mr. Arthur Close, Q.C., Mr. William Hurlburt, Q.C., Mr. Keith Ritter, Q.C., and Ms. Jan Sernyk are also gratefully acknowledged.

C. Structure of the Report

Chapter 2 of the Report examines the present law governing liens in Alberta. Chapter 3 examines the Ontario Repair and Storage Liens Act, which is the only recent Canadian attempt to modernize and reform the law in this area. Chapter 4 sets out the reasons why reform is needed, and identifies the goals of reform and the manner through which they can be most effectively implemented. Chapters 5 to 8 contain recommendations for reform which deal with the nature and extent of the lien, perfection and priority of the lien, registration of the lien and enforcement of the lien. Part III of the Report gathers the recommendations together into a single list. Part IV sets out draft legislation that implements the recommendations. Part V contains several appendices which set out existing Alberta statutes governing liens.

D. Citation of Statutes

For this Report, we have adopted the following convention regarding the citation of statutes. Unless otherwise provided, the following statutes will be identified only by title:

Alberta — Statutes

- Beet Lien Act, R.S.A. 1980, c. B-3
- Garagemen's Lien Act, R.S.A. 1980, c. G-1
- Innkeepers Act, R.S.A. 1980, c. I-4
- Livery Stable Keepers Act, R.S.A. 1980, c. L-20

  Personal Property Security Act, S.A. 1988, c. P-4.05 (abbreviated as the PPSA)
- Possessory Liens Act, R.S.A. 1980, c. P-13
- Threshers' Lien Act, R.S.A. 1980, c. T-4

* Warehousemen's Lien Act, R.S.A. 1980, c. W-3
* Woodmen's Lien Act, R.S.A. 1980, c. W-14

Alberta — Regulations

Personal Property Security Regulation, Alta. Reg. 234/90

Ontario — Statutes

Repair and Storage Liens Act, R.S.O. 1990, c. R.25

Statutes marked with an asterisk are reproduced in the appendices.

CHAPTER 2 — THE PRESENT LAW

A. Introduction

The purpose of this chapter is to describe the present law of liens in Alberta. This task is complex because of the number of statutes and other sources which must be consulted to find the operative rules and principles. It is difficult even to provide a satisfactory definition of a lien. At common law, a lien is defined as a right to retain property of another until a debt or other claim is satisfied. The lien is available only so long as the lien claimant has possession of the goods (this kind of lien will be referred to as a "possessory lien"). However, statutes were later enacted which create liens that do not require the lien claimant to have possession of the property (these will be referred to as "non-possessory liens").

This chapter will begin with a discussion of common law possessory liens. It will then examine in detail the various statutory liens, and briefly discuss equitable liens, maritime liens and Crown liens. Finally, it will discuss the rules and principles which determine the priority of liens in relation to other competing interest holders.

B. Common Law Possessory Liens

(1) The Requirement of Possession

A common law possessory lien gives the lien claimant the right to keep possession of goods belonging to another person until a debt or other claim is paid.[1] The lien claimant must have actual possession of the goods in order to claim the lien. The lien is lost if the lien claimant surrenders possession of the goods,[2] and a subsequent re-acquisition of possession by the lien claimant does not revive the lien.[3] However, the lien claimant does not lose the lien if the loss

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1 *Hammonds* v. *Barclay* (1801), 2 East 227, 102 E.R. 356; *Arnold Brothers Transport Ltd.* v. *Cawthorne Auction Services Ltd.* (1978), 8 Alta. L.R. (2d) 250 at 251 (Dist. Ct.).

2 *Jones* v. *Peale* (1736), 1 Str. 557, 93 E.R. 698.

3 *Re Lehner* (1985), 4 P.P.S.A.C. 254 (Sask. Q.B.); *Pennington* v. *Reliance Motor Works Ltd.*, [1923] 1 K.B. 127.

of possession results from fraud or theft.[4] Nor is the lien lost if the lien claimant surrenders the goods to the debtor under a bailment or agency agreement in which the debtor agrees to hold the goods on behalf of the lien claimant.[5]

(2) General Liens and Particular Liens

A possessory lien may be either a general lien or a particular lien. A particular lien gives the lien claimant the right to keep possession of goods until payment of charges relating to those goods. A general lien is wider in that it also secures charges that relate to goods which are no longer in the possession of the lien claimant.[6] For example, the lien of a repairer is a particular lien which only secures repairs that relate to the goods in the possession of the lien claimant. Suppose that a repairer enters into separate contracts for the repair of two items. The repairer later surrenders one of the items to the debtor. The lien only secures charges that relate to the item remaining in the possession of the repairer. The general lien of a stockbroker secures charges that relate to securities in the possession of the stockbroker as well as previous charges that relate to securities that have been surrendered or sold.

(3) Types of Common Law Possessory Liens

There are three methods by which a lien was recognized at common law. First, a lien could arise by operation of law. This meant that the courts recognized the existence of a lien in favour of certain classes of claimants. Second, a lien might arise out of an express contract between the creditor and the debtor. Third, a lien could arise by usage of trade.

(a) Liens arising by operation of law

All common law liens that arise by operation of law are particular liens. The lien secures only those charges that relate to the goods in the possession of the lien claimant. The cases in which common law liens were given by operation of law may be classified into two groups: (1) those in which the lien claimant was

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4 *Coutts Machinery Co. Ltd.* v. *Richards* (1986), 71 A.R. 232 (Q.B.); *Wallace* v. *Woodgate* (1824), 171 E.R. 1323.

5 *Albemarle Supply Co.* v. *Hind & Co.*, [1928] 1 K.B. 307; *J.H.Early Motor Co. Ltd.* v. *Siekawitch*, [1931] 3 W.W.R. 521 (Sask. C.A.).

6 *Senft* v. *Bank of Montreal* (1986), 69 A.R. 35 (Q.B.).

engaged in a common calling and was therefore required by law to accept the goods or to provide the services (the lien of the innkeeper and the common carrier); (2) those in which the lien claimant performed work which improved the goods (the artificer's lien). A brief description of these liens follows:

(i) Innkeeper's lien

An innkeeper has a lien on the goods brought to the premises including a vehicle.[7] The lien only covers charges for board and lodging.[8] An innkeeper may claim a lien even though the debtor is not be the owner of the goods.[9] For example, a hotel may assert an innkeeper's lien against the true owner even though it was a thief who brought the goods to the hotel.[10]

(ii) Common carrier's lien

A common carrier has a lien on goods carried to the extent of any unpaid freight charges. A common carrier is a person who represents to the public a willingness to carry for hire goods for any person or any passengers whoever they may be.[11] A person who reserves the right to accept or reject persons or goods is a private carrier and not a common carrier.[12] A private carrier does not have a lien at common law unless it arises out of an express contract or usage of trade. The lien only covers charges for freight and does not cover other charges such as for storage of the goods.[13] A common carrier has a lien against the

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7 *R. & R. Cunningham Enterprises Ltd.* v. *Vollmers*, [1973] 4 W.W.R. 339 (Alta. S.C.).

8 *Ibid.* (charges for storage of vehicle not secured by the lien).

9 *Ibid.*; *Robins & Co.* v. *Gray*, [1895] 2 Q.B. 50.

10 *Marsh* v. *M.P.C.*, [1945] K.B. 43.

11 *Belfast Ropework Co.* v. *Bushell*, [1918] 1 K.B. 210.

12 A furniture mover usually will not fall within the definition of a common carrier because a right to refuse business is usually reserved. See *Mellish* v. *Campbell Storage*, [1946] 3 W.W.R. 157 (B.C. Co. Ct.).

13 *Winchester* v. *Bushby* (1889), 16 S.C.R. 336.

goods of an owner even though the owner did not authorize the carriage of the goods.[14]

(iii) Artificer's lien

A person who has improved goods through the expenditure of money, labour or skill has a lien on the goods. The lien is only available if the lien claimant improves the goods. This requirement is not met if the services merely result in the maintenance of the value of the goods. As a result, a common law lien was not available in favour of persons who stored goods or who fed and cared for animals.[15] Unlike the innkeeper's lien and the carrier's lien, an artificer's lien is only available if the owner of the goods authorized the work.[16]

(b) Contractual liens

A lien could arise by virtue of a contract between the parties.[17] A contractual lien is governed by the terms of the agreement. The lien could be a general or a particular lien depending upon the terms of the contract.

(c) General liens arising by usage of trade

To establish a lien by usage there must be satisfactory evidence of numerous and important instances of its exercise.[18] If this is shown, the parties are presumed to contract on that basis unless they expressly agree to exclude it. Liens in favour of factors, bankers, stockbrokers and solicitors have been held to

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14 *Halsbury's Laws of England*, 4th ed., vol. 5, para 447.

15 *Hatton* v. *Car Maintenance Co. Ltd.*, [1915] 1 Ch. 621 (lien not available for maintenance of motor vehicle); *Morrison* v. *Bryan* (1909), 12 W.L.R. 415 (Sask. Dist. Ct.) (lien not available to an agister for feeding of animals).

16 *Alberta Drilling & Developing Co. Ltd.* v. *Lethbridge Iron Works Co. Ltd.*, [1947] 1 W.W.R. 983 (Alta. Dist. Ct.).

17 *Adanac Tire and Retreaders Ltd.* v. *Sheriff of the Judicial District of Edmonton* (1979), 9 Alta. L.R. (2d) 66 (Dist. Ct.).

18 *Rushforth* v. *Hadfield* (1805), 6 East 519, 102 E.R. 1386.

arise out of trade usage.[19] All of these are general liens. The modern tendency of the courts is to require strict proof of the usage because of the detrimental effect of the lien on other creditors who will not have recourse to the property if the lien is recognized.[20]

(4) Enforcement of the Lien

Common law liens that arose by operation of law were passive liens. The lien claimant could detain the goods until the charges relating to the goods were paid, but did not have the right to sell the goods.[21] However, a right of sale has subsequently been given by statute to every class of common law lien. The creation of a statutory right of sale does not create the lien or deprive the lien claimant of any of the rights enjoyed at common law. The statute merely gives the lien claimant additional rights that were not available at common law.[22]

The situation is different in respect of contractual liens and general liens. The parties may provide a right of sale by contract. A right of sale in respect of a general lien may also arise through usage of trade. A right of sale arising out of usage has been found in the case of a stockbroker's lien.[23] The general lien of a solicitor is a passive lien which only gives rise to a right to keep a client's papers.[24]

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19 *Cowell* v. *Simpson* (1809), 16 Ves. 275 (factors); *Brando* v. *Barnett* (1846), 12 Cl. & F. 787 (bankers); *Re London and Globe Finance Corp.*, [1902] 2 Ch. 416 (stockbrokers); *Ex parte Sterling* (1809), 16 Ves. 275 (solicitors).

20 *Squamish Terminals Ltd.* v. *Price-Waterhouse Ltd.* (1980), 26 B.C.L.R. 22 (S.C.).

21 *Mulliner* v. *Florence* (1878), 3 Q.B.D. 484 (C.A.) (innkeeper liable in conversion for wrongful sale of goods subject to a lien).

22 *Alberta Drilling & Developing Co. Ltd.* v. *Lethbridge Iron Works Co. Ltd.*, *supra*, note 16.

23 *Jones* v. *Davidson Partners Ltd.* (1981), 1 P.P.S.A.C. 242 (Ont. S.C.).

24 In addition to the general or retaining lien, a solicitor has a common law particular lien on a fund or proceeds of a judgment recovered for a client and may also apply to court for a statutory charging order pursuant to Rule 625 of the Rules of Court on any property recovered or preserved by the solicitor's instrumentality. See *Halsbury's Laws of England*, 4th ed., vol. 44, para. 226.

(5) Termination of the Lien

A common law possessory lien comes to an end if the lien claimant loses possession of the goods. The lien also comes to an end if the debtor tenders the amount secured by the lien to the lien claimant.[25] The lien may be lost if the lien claimant waives the lien. An implied waiver occurs if the lien claimant takes alternative security that is incompatible with the lien or which shows an intention to waive it.[26] Similarly, the granting of a period of credit is inconsistent with a lien.[27] The lien claimant may lose the lien by breaching the contract with the debtor. This may occur if the lien claimant wrongfully purports to set up a claim to the goods on some other ground[28] or if the lien claimant asserts the lien for an excessive amount.[29] The lien claimant has no right to use the goods, and the wrongful use of the goods by the lien claimant destroys the lien.[30]

C. Statutory Liens

(1) Introduction

Common law liens are limited in three important respects. First, a lien is only available to certain classes of claimants unless the parties created the lien by contract. Second, the common law lien is a passive lien which did not give the lien claimant a right of sale. Third, continuous possession of the goods by the lien claimant is essential to the validity of the lien.

Over the past one hundred years, legislation has been enacted to change the common law position. A right of sale is given by statute to all common law liens.[31] Several statutes have broadened the classes of persons entitled to claim a lien. Statutory liens have been created in favour of boarding and lodging house

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25 *Albemarle Supply Co. Ltd.* v. *Hind & Co., supra*, note 5.

26 *Bank of Africa Ltd.* v. *Salisbury Gold Mining Co. Ltd.*, [1892] A.C. 281 (P.C.).

27 *Hewison* v. *Guthrie* (1836), 2 Bing NC 755, 132 E.R. 290.

28 *Weeks* v. *Goode* (1859), 6 C.B.N.S. 367, 141 E.R. 499.

29 *Barker* v. *Buck*, [1934] 1 W.W.R. 223 (Man. C.A.).

30 *Gurr* v. *Cuthbert* (1843), 12 L.J. Ex. 309 (C.A.).

31 Innkeepers Act (right of sale given to innkeepers); Possessory Liens Act (right of sale given to artificer's).

keepers,[32] stable keepers,[33] warehouse keepers[34] and other storers of goods.[35] Finally, statutory liens which depart significantly from the common law notion of a lien have been enacted. Statutory liens in favour of wood workers,[36] threshers,[37] beet growers[38] and garage keepers[39] differ from common law liens in that the lien is available even though the lien claimant is not in possession of the goods.

The statutes do not adopt a common approach in establishing the rights, obligations and remedies in relation to a lien. It is therefore necessary to examine the particular approach taken by each statute. The discussion of each statute will be divided into the following parts:

Origins:

Legislative history and purpose of the statute.

Entitlement to lien:

Description of the persons entitled to the lien, the property subject to the lien and the obligation secured by the lien.

Validity and priority of lien:

Special rules governing the validity of the lien (steps that must be completed in order to ensure that the lien is enforceable) and the priority of the lien (rules determining who has the first claim to the goods as

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32 Innkeepers Act, s.2.

33 Livery Stable Keepers Act.

34 Warehousemen's Lien Act.

35 Possessory Liens Act, s.4.

36 Woodmen's Lien Act.

37 Threshers' Lien Act.

38 Beet Lien Act.

39 Garagemen's Lien Act.

between the lien claimant and some other third party who has a property interest in the goods).

Enforcement of lien:

Procedures for the enforcement of the lien by sale and the distribution of the proceeds of sale.

(2) Garagemen's Lien Act

(a) Origins

The Garagemen's Lien Act was enacted in 1937.[40] Alberta was the first province to adopt such legislation. Similar legislation was later enacted in the other three western provinces.[41] The legislation is unique in that it creates a non-possessory lien but requires registration of it at a public registry. The lien is widely use. Registry statistics show that 12,604 liens were registered at the Personal Property Registry during the period of January 1, 1991 to December 31, 1991.

(b) Entitlement to the lien

The Garagemen's Lien Act gives a garageman a lien on a motor vehicle or a farm vehicle. The lien secures money owing for the storage, repair or maintenance of the vehicle. The lien may also secure the price of accessories or parts furnished.[42] A "garageman" is defined as a person who keeps a place of business for the housing, storage or repair of a motor vehicle or farm vehicle. A "motor vehicle" is defined as a vehicle propelled by any power other than muscular power including an airplane but excluding a motor vehicle that runs only on rails. A "farm vehicle" is defined as a farm machine or other farm equipment that is identifiable by a manufacturer's serial number that is used or intended for use in any type of farming operation and that is not a motor vehicle.

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[40] Garagemen's Lien Act, S.A. 1937, c.77.

[41] Garage Keepers Act, R.S.M. 1987, c. G-10; Garage Keepers Act, R.S.S. 1978, c. G-2; Repairers Lien Act, R.S.B.C. 1979, c.363.

[42] Garagemen's Lien Act, s.2(1).

The lien is not available to secure the price of fuel, oil or grease furnished for a motor vehicle or farm vehicle.[43]

The lien covers the vehicle and any accessories or attachments to it.[44] The lien may be claimed where the services are rendered in relation to part of a vehicle. For example, a lien may be claimed in an aircraft engine that has been removed from an aircraft. There are two significant problems with attempting to take a lien on part of a vehicle. First, it may be impossible to comply with the registration requirements. The registration must include the serial number of the vehicle, and this information may not be available to the lien claimant.[45] Second, it is unclear what happens to the lien if the part is later attached to the vehicle.[46]

(c) Validity and priority of the lien

The Garagemen's Lien Act creates both a possessory and a non-possessory lien. A lien claimant who does not maintain possession of the vehicle must satisfy two requirements. The first is that the lien claimant must get an acknowledgment of indebtedness signed by the debtor. The second is that the lien claimant must register the lien.

(i) Written acknowledgment of indebtedness

The Act does not specify the point in time when the lien claimant must get a written acknowledgment of indebtedness. Garagekeepers' lien legislation of other provinces provide that the lien claimant must get the acknowledgment of indebtedness before releasing the goods to the debtor.[47] The Alberta statute

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[43] Section 2(3).

[44] *Province of Alberta Treasury Branches* v. *Don-Gar Construction (1990) Ltd.* (1992), 1 Alta. L.R. (3d) 120 (M.C.).

[45] This is a problem with equipment such as aircraft engines which may be switched from one aircraft to another. It may be impossible to identify the aircraft in which the engine will be installed at the time of the repairs, and the engine subsequently may be removed and installed in another aircraft.

[46] There are three possibilities: (1) the lien might be lost; (2) the lien might persist in the part but not in the whole vehicle; or (3) the lien might extend to the whole vehicle.

[47] See Repairers Lien Act, R.S.B.C. 1979, c. 363, s.3(1); The Garage Keepers Act, R.S.S. 1978, c. G-2, s.4(b).

originally required that the lien claimant obtain an acknowledgment of indebtedness before releasing possession to the debtor.[48] In 1976 the statute was amended to provide that a lien claimant could get the benefit of the statutory lien by retaining possession of the goods as an alternative to registration.[49] However, the new wording of the amendment did not clearly specify that the lien claimant was required to get an acknowledgment of indebtedness before releasing the goods. It has been held that the failure to get a written acknowledgment of indebtedness at the time the goods are surrendered is not fatal.[50] The lien is enforceable so long as the requirement is satisfied at some later date. Of course, the practice of most lien claimants is to get an acknowledgment before the goods are surrendered. A failure to do so creates a risk that the owner may refuse to sign the acknowledgment.

(ii) Registration of the lien

A non-possessory lien must be registered 21 days after the lien claimant surrenders possession to the owner. If the lien claimant does not have possession of the goods, the lien must be registered 21 days after the lien claimant completed the repairs or furnished the parts. A failure to register the lien within the 21 day period invalidates the lien.[51] A lien is registered by completion of a Garagemen's Lien Financing Statement and registration of it in the Personal Property Registry. The registration must describe the vehicle by serial number and set out the amount of the lien. It must also give the name and address of the lien claimant and the name and address of the owner of the vehicle.[52] The lien continues for 6 months from the date of registration. It then comes to an end unless the vehicle is seized or the sheriff is instructed to seize the vehicle. In addition, the Court of Queen's Bench may extend the time for seizure for a further period not exceeding 6 months when it appears that seizure cannot be

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48 Garagemen's Lien Act, R.S.A. 1970, c. 155, s.3(3).

49 Attorney General Statutes Amendment Act, 1976, S.A. 1976, c. 57, s.3.

50 *Union Tractor Ltd.* v. *FMX Construction Ltd.* (1992), 126 A.R. 321.

51 Garagemen's Lien Act, s.3(1). A failure to register within the 21 day period cannot be cured. The computer registry system is set up so that a registration can only be accepted if it is within the 21 day period.

52 Personal Property Security Regulation, s.22.

effected during the period.[53] The lien claimant must register the order before the initial 6 month period expires to continue the lien. Although there is no provision in the Garagemen's Lien Act which permits amendment of a registration, it has been held that the Court has the power to order rectification.[54]

A lien claimant must discharge the registration if the indebtedness secured by the lien is paid, if the vehicle is sold through an enforcement sale. The lien claimant must also discharge the registration if the lien claimant is not entitled to claim the lien. The Act sets out a procedure which the owner may invoke if the lien claimant fails to discharge the lien.[55] The owner may give a written demand requiring the lien claimant to discharge the registration or to register an order of the Court confirming that the registration need not be amended or discharged. If the lien claimant fails to comply with the demand, the person giving the demand may amend or discharge the registration.

The effect of registration errors on the validity of the registration has been considered in a series of cases.[56] These authorities are now of limited use because of changes to the legislation. The Garagemen's Lien Act used to have a curative provision which provided that a substantial compliance with the requirements of the forms for registration was sufficient. An error would not invalidate the registration unless a person having an interest in the goods were prejudiced.[57] Courts took a generous view towards errors and upheld the validity of the registration so long as the lien claimant made a reasonable effort

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53 Garagemen's Lien Act, s.7.

54 *Ed Miller Sales & Rentals Ltd.* v. *Canadian Imperial Bank of Commerce* (1987), 79 A.R. 161 (C.A.). Section 43 of the Personal Property Security Regulation provides for registration of a garagemen's lien financing change statement that is registered with a copy of the Court order attached.

55 Garagemen's Lien Act, s.11.1. This procedure is similar to the procedure provided in section 50 of the PPSA for compulsory discharge or amendment of a financing statement relating to a security interest.

56 *Union Tractor Ltd.* v. *Debsco Construction & Development Ltd.* (1985), 40 Alta. L.R. (2d) 153 (Q.B.); *Ed Miller Sales & Rentals* v. *Rosen* (1984), 55 A.R. 172 (Q.B.); *Leonard Holdings Ltd.* v. *Sigmy Trucking Repairs Ltd.* (1978), 8 Alta. L.R. (2d) 106 (Dist. Ct.).

57 Garagemen's Lien Act, R.S.A. 1980, c. G-2, s.11, repealed S.A 1988, c. P-4.05, s.83.

to comply. However, if the error actually prejudiced a third party, the lien claimant could not take the advantage of the curative provision.[58]

The curative provision was repealed on the coming into force of the PPSA on October 1, 1990. The effect of errors in a registration is now governed by the PPSA.[59] Section 43(6) of the PPSA provides that the validity of a registration is not affected by a defect, irregularity, omission or error unless it is seriously misleading. This is an objective test which does not require that a person actually be misled by the error.[60] This test of validity is incompatible with the substantial compliance test which formerly governed. The registration is invalid if it has the potential to mislead a reasonable user of the system. The test is the same whether the issue of validity is between the lien claimant and the debtor, or between the lien claimant and a third party.

(iii) Priority provisions

A garageman's lien is postponed to a charge, lien or encumbrance on the vehicle that is created before the lien is registered if the interest is taken in good faith and without notice of the lien. An unregistered lien is subordinate to the competing interest only if the competing interest arises after the garageman's lien comes into existence.[61] The Act also provides a priority rule for a contest between two or more garagemen's liens. A person whose claim is registered earlier in time is given priority over a person whose claim of lien is registered later in time.

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[58] *Ed Miller Sales & Rentals Ltd.* v. *Canadian Imperial Bank of Commerce, supra,* note 54.

[59] Section 42(1.1) of the PPSA provides that Part 4 of the PPSA (which deals with registration) applies where any other enactment permits or requires a registration to be made in the Personal Property Registry unless the Regulation provide otherwise. Section 43(6) of the PPSA is not one of the sections excluded from operation by the Personal Property Security Regulation, s.58(1).

[60] PPSA, s.43(8). And see *Kelln* v. *Strasbourg Credit Union,* [1992] 3 W.W.R. 310 (Sask. C.A.).

[61] *R. Angus Alberta Ltd.* v. *Union Tractor Ltd.* (1967), 61 W.W.R. 603 (Alta. Dist. Ct.).

(iv) The statutory possessory lien

The Garagemen's Lien Act at one time created only a non-possessory lien. A claim to a possessory lien was governed by the common law and the Possessory Liens Act. This was changed in 1976 when the legislation was amended to provide for a statutory possessory lien in addition to the statutory non-possessory lien.[42] The Garagemen's Lien Act provides that the statutory lien is in addition to any other remedy that a lien claimant has for the recovery of money.[43] This would appear to preserve the common law possessory lien.[44] It seems therefore that a lien claimant has the option of claiming either a common possessory law lien or a possessory lien under the Garagemen's Lien Act (a statutory possessory lien).

A lien claimant who claims on the basis of a statutory possessory lien does not have to get a written acknowledgment of the indebtedness and does not have to register the lien. Furthermore the statutory possessory lien is not subject to the 6 month period for enforcement. However, a literal reading of the Act suggests that a statutory possessory lien that is not registered is subordinate to any subsequent interest created in good faith and without notice. It has been held that the priority and enforcement of a possessory lien is governed by the Possessory Liens Act rather than the Garagemen's Lien Act.[45] This interpretation is troublesome because the Garagemen's Lien Act was expressly amended to create a possessory lien. An alternative approach is to apply a theory of concurrent liens. The lien claimant may elect to assert the common law lien (governed by the Possessory Liens Act) instead of asserting the statutory lien, and obtain priority on the basis of its common law lien.

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[42] Attorney General Statutes Amendment Act, 1976, S.A. 1976, c. 57, s.3.

[43] Garagemen's Lien Act, s.2(1).

[44] In Saskatchewan, courts have held that the Act replaces the right at common law to continue possession by surrendering possession to the debtor under an agency or bailment agreement. See *Canadian Imperial Bank of Commerce* v. *Tisdale Farm Equipment Ltd.*, [1984] 6 W.W.R. 122 (Sask. Q.B.), aff'd [1987] 1 W.W.R. 574 (Sask. C.A.). In all other respects, the common law possessory lien is preserved.

[45] *Bank of Nova Scotia* v. *Henuset* (1987), 50 Alta. L.R. (2d) 253 (Q.B.)

(d) Enforcement of the lien

The Garagemen's Lien Act[66] provides that a vehicle subject to a lien shall be seized by a sheriff in accordance with the Seizures Act. This incorporates the seizure and notice of objection system and the sale procedure set out in the Seizures Act.[67] A seizure pursuant to a garageman's lien operates as a seizure in respect of all outstanding garagemen's liens.[68] The proceeds of sale are applied first to the expenses of sale, then in payment of the indebtedness secured by the lien. Any money remaining is then distributed pursuant to the Seizures Act.[69]

A literal reading of the legislation suggests that a statutory possessory lien must be enforced through the same procedure that applies to a non-possessory lien. This produces inefficiency since there is no good reason why a sheriff must undertake a seizure when the lien claimant is already in possession of the goods. As a result, the lien claimant may choose to assert the common law lien and enforce the lien by sale under the Possessory Liens Act.[70]

(3) Possessory Liens Act

(a) Origins

The Possessory Liens Act was enacted in 1921.[71] The statute expands the classes of claimants entitled to a lien. The statute also gives a lien claimant the right to sell the goods subject to a lien. A right of sale was given to repairers by mechanic's lien legislation in 1889,[72] but this was repealed upon the enactment of the Possessory Liens Act. In 1923 the province of New Brunswick enacted

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[66] R.S.A. 1980, ss. 9-10.

[67] Seizures Act, R.S.A. 1980, c. S-11, ss. 14, 23-37.

[68] Garagemen's Lien Act, s.6(2).

[69] Section 10(2).

[70] *Bank of Nova Scotia* v. *Henuset*, *supra*, note 65.

[71] S.A. 1921, c. 10.

[72] Mechanics' Lien Ordinance, O.N.W.T. 1889, No. 5.

legislation[73] which is nearly identical to the Alberta Act. There is no equivalent statute in other provinces. Other provinces have expanded the classes of lien claimants to include certain kinds of storers. For example, the Livestock Lien Act[74] of British Columbia creates an agister's lien. However, only Alberta and New Brunswick have enacted a comprehensive statute that creates a general entitlement to a possessory lien. As a result, Alberta and New Brunswick have the most expansive possessory lien legislation of any of the common law provinces.

(b) Entitlement to the lien

The Possessory Liens Act gives a person a particular lien for the payment of a debt on a chattel on which the person has expended money, labour or skill at the request of the owner of it and thereby enhanced its value.[75] This is simply a restatement of the common law repairer's or artisan's lien. The statute does not take away any of the rights the lien claimant had at common law, but merely gives the lien claimant a right of sale.[76]

The Act gives a bailee, whether gratuitous or for reward, a particular lien on a chattel bailed by the owner of it for charges that are due to the bailee under the terms of the contract of bailment.[77] This is a major change to the common law. The common law did not recognize a lien for storage or maintenance of goods because the services merely preserved the goods and did not result in an enhancement of them. The Warehousemen's Lien Act and the Livery Stable Keepers Act gave a lien to certain kinds of storers, but did not create a general right to a lien in favour of bailees.

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73 Liens on Goods and Chattels Act, S.N.B. 1923, c.7. See now R.S.N.B. 1973, c. L-6.

74 R.S.B.C. 1979, c. 244.

75 Possessory Liens Act, s.2.

76 *Alberta Drilling & Development Co. Ltd.* v. *Lethbridge Iron Works Co. Ltd.*, *supra*, note 22.

77 Possessory Liens Act, s.4(1). The reference to a gratuitous bailee is puzzling. If the bailment is gratuitous, there will be no charges due and therefore no lien can be claimed under s.4(1).

The Act creates a lien in favour of a bailee if the bailor fails to take possession of the goods at the end of the term under a contract of bailment (or after notification if the contract does not specify the term of the bailment).[78] A Court may dispense with the giving of notice if the bailor's whereabouts are unknown.[79] The Act also creates a lien when no contract of bailment exists.[80]

At common law, a lien did not secure the costs of storage of the goods or the cost of enforcing the lien.[81] The Act changes this rule and permits a lien claimant to claim certain storage charges that are incurred after a lien is asserted. The lien secures storage charges during the period of detention if the contract provides for the payment of storage charges.[82] If the lien relates to a motor vehicle, the lien secures ordinary and reasonable charges for storage even without a contractual provision for payment of storage charges.[83]

The Act only applies if there is no provision for realizing by sale in any other statute, and no provision is made in any other statute for determining the rights of the owner of the goods and the bailee.[84] This excludes liens arising under the Garagemen's Lien Act, the Thresher's Lien Act and the Woodmen's Lien Act. The Act does not apply to a lien given under the Innkeepers Act, the Livery Stable Keepers Act or the Warehousemen's Lien Act.[85] The Act does not affect the law respecting general liens.[86]

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[78] Section 4(2).

[79] Section 4(3).

[80] Section 4(3)(b). This could encompass a gratuitous bailment and a non-contractual bailment for reward.

[81] *Somes* v. *British Empire Shipping Co. Ltd.* (1860), 30 L.J. Q.B. 229; *Canada Steel & Wire Co.* v. *Ferguson Bros.* (1915), 8 W.W.R. 416 (Man. C.A.).

[82] Possessory Liens Act, s. 9(1).

[83] Section 9(2).

[84] Section 13(a).

[85] Section 13(b).

[86] Section 14.

(c) Validity and priority of the lien

The Act provides that actual or constructive and continued possession of the property is essential to the existence of the lien.[87] This merely codifies the common law requirement that the lien claimant maintain possession of the goods. The reference to continued possession codifies the common law position that loss of possession destroyed the lien and a re-acquisition of possession did not revive it.[88] The reference to constructive possession incorporates the common law view that the lien claimant does not lose the lien if the goods are released to the debtor under an agency or bailment agreement in which the debtor agrees to hold the goods on behalf of the lien claimant.[89]

The liens governed by the Act are particular liens and not general liens.[90] The right to a lien under the Act may be waived by an express agreement in writing based on legal consideration.[91] The lien claimant may detain the property until payment of the debt.[92] These provisions simply restate some of the common law rules.

(d) Enforcement of the lien

A lien claimant begins the enforcement process by serving notice on the debtor.[93] The notice may be served 3 months after the debt arises in the case of a motor vehicle, or 6 months in the case of other property. If there is a contract of bailment, the notice may be served at the end of the term specified in the contract of bailment or at the end of the period specified in a notice directing the debtor to take possession of the goods. The notice must specify a reasonable time and place for payment of the debt, the amount owing and the property detained. It must also state that in default in payment an application will be

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87 Section 5.

88 *Pennington* v. *Reliance Motor Works Ltd.*, *supra*, note 3.

89 *Supra*, note 5.

90 Possessory Liens Act, s.6.

91 Section 7.

92 Section 8.

93 Section 10.

made to Court for leave to sell the goods. The date set for the application must be no less than 30 days after the date of mailing or service of the notice. If the amount remains unpaid, the lien claimant may make an informal application to Court for sale of the goods. The Court may make any order that seems just to it, and may give informal directions concerning the sale. It is not necessary to take out an order for sale unless otherwise directed by the Court. If there is a dispute between the bailor and bailee about the amount in dispute or if the bailor does not appear, the Court may fix the amount due in a summary way or direct an action to be brought. The Court may make an order for substituted service if it is not practicable to serve a notice on the debtor.[94]

The normal sale procedure is varied in two situations. If the goods are perishable, the lien claimant may apply to a Court for leave to sell the goods and the Court may give directions for their sale.[95] If the lien claimant believes on reasonable grounds that the goods have a total market value of less than $300, no order for sale is needed and the goods may be sold for a reasonable price.[96] If they cannot be sold within a reasonable time, the lien claimant may dispose of them in any manner that the lien claimant considers to be reasonable.

The proceeds of sale are applied first in payment of the expenses of sale, and then in payment of the lien claimant's debt. Any surplus is paid to the person who is entitled to it on application by that person.[97] If no application is made, the surplus must be paid to the Provincial Treasurer and kept for one year on behalf of the owner. If it is unclaimed during that period, it forms part of the General Revenue Fund. The Provincial Treasurer may pay the money to a person entitled to it or may refer the matter to a judge of the Court of Queen's Bench.

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[94] Section 11.

[95] Section 9(3).

[96] Section 11.1.

[97] Section 12.

(4) Innkeepers Act

(a) Origins

Innkeepers legislation was first introduced into the jurisdiction in 1884.[98] It was based on English legislation passed in 1878 which gave an innkeeper a right of sale.[99] A portion of the Act deals with the lien of the innkeeper while the remainder of it deals with the liability of innkeepers.

(b) Entitlement to the lien

The Innkeepers Act provides that an innkeeper, boarding house keeper or lodging house keeper may detain on the premises the trunks or other personal property of a person who is indebted for board or lodging.[100] At common law only an innkeeper (i.e., a person who holds out that accommodation will be provided to any guest who appears to be able and willing to pay and is in a fit state) was entitled to a lien. The statute gives a lien to boarding house keepers and lodging house keepers who did not have a lien at common law.

(c) Validity and priority of the lien

At common law, an innkeeper could claim a lien on property that the guest brought to the inn. The lien was not restricted to the goods of the guest, but extended to goods belonging to third parties even if they had been stolen from the owner. The justification for this rule was that an innkeeper was engaged in a common calling which placed a legal obligation on the innkeeper to accept guests into the inn. The common law lien of the innkeeper was a passive lien which did not give the lien claimant a right of sale. A sale of the goods subject to the lien rendered the lien claimant liable in conversion.[101] Innkeepers legislation created an active lien which gave the lien claimant a right of sale.

The legislation does not abolish the common law right to a lien. It merely creates a right of sale. Therefore, the common law right of an innkeeper to assert

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98 Hotelkeepers' Ordinance, O.N.W.T. 1884, No.34.

99 Innkeepers Act, 1878, 41 & 42 Vict., c.38.

100 Innkeepers Act, s.2.

101 *Mulliner* v. *Florence*, *supra*, note 21.

the lien against goods belonging to a third party continues to exist.[102] A boarding house keeper or a lodging house keeper does not have a lien against goods belonging to third parties. These claimants were not entitled to a lien at common law, and the statutory lien given to them by the Innkeepers Act only extends to goods belonging to the guest.[103]

(d) Enforcement of the lien

The lien claimant has the right to enforce the lien by public auction if the charges for room or board remain unpaid for one month.[104] Notice of the intended sale must be published in a local newspaper at least one month before the intended sale. The notice must set out the name of the guest, the amount of the indebtedness, a description of the property to be sold, the time and place of the sale and the name of the auctioneer.

The proceeds are applied first to the satisfaction of the lien and the costs of advertising and sale.[105] Any surplus is paid to the person entitled to it on application by that person. If no application is made, the surplus must be paid to the Provincial Treasurer and kept for one year on behalf of the owner. If it is unclaimed during that period, it forms part of the General Revenue Fund. The Provincial Treasurer may pay the money to a person entitled to it or may refer the matter to a judge of the Court of Queen's Bench.

The guest may pay 110% of the money claimed by the lien claimant into Court if there is a dispute over the amount claimed.[106] The lien claimant's right to detain the property ceases after service of a notice on the lien claimant of the payment into Court. The lien claimant must commence action within 30 days after receiving notice, otherwise the money will be paid back to the guest.

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102 *R.& R. Cunningham Ent. Ltd.* v. *Vollmers, supra*, note 7; *Bank of Montreal* v. *414031 Ontario Ltd.* (1983), 2 P.P.S.A.C. 248 (Ont. Dist. Ct.).

103 *Newcombe* v. *Anderson* (1886), 11 O.R. 665 (Q.B.D.).

104 Innkeepers Act, s.2(2).

105 Section 3.

106 Section 4.

(5) Livery Stable Keepers Act

(a) Origins

The Livery Stable Keepers Act was first enacted in 1884.[107] Stable keepers did not have a lien at common law because their services did not result in an improvement of the goods[108] and because they did not maintain continuous possession[109] (the owner had access to the animals).

(b) Entitlement to the lien

The Livery Stable Keepers Act gives a lien on any animal, vehicle, harness, furnishings or other related gear and the personal effects to the debtor in the possession of the lien claimant.[110] The lien secures the value of any food, care, attendance or accommodation furnished for the animal or thing. The stable keeper does not have the right to keep the registration papers of thoroughbred horses if the stable keeper does not have possession of the horse.[111] The lien is available to a boarding stable keeper (a person who stables, boards or cares for any animal), a livery stable keeper (a person who carries on the business of letting or hiring out carriages, sleighs or other vehicles, horses or other animals) and a sale stable keeper (a person who stable boards or cares for an animal with the intention of selling it in return for a commission or other payment for services). A literal reading of this provision may suggest that it creates a lien in favour of any person who boards or cares for any animal. However, a court has held that it does not cover feed lot operators and other agisters.[112] Such persons are, however, entitled to claim a lien under the Possessory Liens Act.

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107 Livery Stablekeepers Ordinance, O.N.W.T. 1884, No. 35.

108 *Judson* v. *Etheridge* (1833), 1 Cr. & M. 743, 149 E.R. 598.

109 *Scarfe* v. *Morgan* (1838), 4 M. & W. 270, 150 E.R. 1403.

110 Livery Stable Keepers Act, s.2.

111 *Petrowski* v. *Buzzeo* (1990), 74 Alta. L.R. (2d) 267 (Q.B.).

112 *Sparling* v. *Ward*, [1925] 2 W.W.R. 181 (Alta. Dist. Ct.).

(c) Validity and priority of the lien

The Act provides that the lien has priority over any existing lien, security interest or other charge or encumbrance.[113] This does not give a stable keeper a lien on an animal that the debtor does not own unless the owner authorized the debtor to incur such expenses.[114] The stable keeper is not entitled to the benefit of the lien unless a copy of the Act is posted in a conspicuous place in every stable owned or operated by the stable keeper.[115] It is unclear if the time for determining compliance with this notice provision is the time of execution of the contract, the time when the lien is asserted against the debtor or some other point in time.

(d) Enforcement of the lien

If the owner does not reclaim the animal by discharging the indebtedness within one month, the stable keeper may sell the animal by public auction. The stable keeper must give notice of the sale by advertisement in the newspaper published nearest to the stable and by posting notices of the sale in the stable.[116] The notice must set out the name of the owner, the amount of the lien, a description of the animal or goods and the name of the seller.

The proceeds of sale are applied first to the expenses incurred in the detention, advertising and sale of the goods, then to the satisfaction of the lien.[117] If there is a surplus following the sale and the person entitled to it does not apply for it within one month of the date of the sale, the surplus is paid to the Provincial Treasurer and kept in a special trust account for one year.[118] If it remains unclaimed, it is paid into the General Revenue Fund. If there is a dispute as to entitlement, the matter may be referred to a judge of the Court of Queen's Bench.

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113 Livery Stable Keepers Act, s.2(2).

114 *Yeo* v. *Farragher*, [1918] 1 W.W.R. 624 (Man. C.A.).

115 Livery Stable Keepers Act, s.7.

116 Section 4.

117 Section 5.

118 Section 6.

(6) Threshers' Lien Act

(a) Origins

The Threshers' Lien Act was first enacted in 1895.[119] The Crop Liens Priorities Act, which was enacted in 1941, provides for the priority of the lien in relation to other claims.[120] Saskatchewan and Manitoba have similar legislation.[121]

(b) Entitlement to the lien

The Act gives a lien in favour of a person who threshes grain or who cuts and threshes grain with a harvester thresher, combination thresher or any other implement that both cuts and threshes grain.[122] This covers combining where the crop is cut and threshed in one operation. It also covers a two step operation in which the crop is first swathed and left to ripen on the field and later picked up and threshed by the combine.[123] The lien does not secure charges for hauling grain, and an attempt to claim a lien for both threshing and hauling may invalidate the lien.[124] The lien is available only where the services are provided for a fixed price or rate of remuneration.[125] The amount of the lien can not exceed the amount that represents a fair remuneration having regard to the usual and ordinary charges prevailing in the locality.[126]

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119 Thresher's Lien Ordinance, O.N.W.T. 1895, No. 24.

120 S.A. 1941, c. 46. See now R.S.A. 1980, c. C-34.

121 Threshers' Liens Act, R.S.M. 1987, c. T-60; Threshers' Lien Act, R.S.S. 1978, c. T-13.

122 Threshers' Lien Act, s.1.

123 *Ostevik* v. *Pioneer Grain Co. Ltd.*, [1932] 3 W.W.R. 148 (Sask. Dist. Ct.).

124 *Barker* v. *Buck*, *supra*, note 29.

125 Threshers' Lien Act, s.1.

126 Section 2(2).

(c) Validity and priority of the lien

The threshers' lien has a very short fuse in that it persists for 60 days after the completion of the services. The thresher must enforce the lien during this period by giving notice to the owner and taking possession of the grain. A failure to do so within this period results in a loss of the lien.[127]

The lien has priority over all writs of execution against the owner of the grain, all security interests as defined in the PPSA made by the owner, and all rights of distress for rent.[128] However, a person who takes possession of the grain and advances money on the security of it in good faith and without knowledge of the lien has priority over the lien.[129] The lien is lost if the grain is sold and delivered to a bona fide purchaser and removed from the premises and vicinity in which it is threshed. In its place, the lien claimant gets a first charge on so much of the price that remains unpaid at the time notice of the lien is given.[130] Several other provincial statutes create liens on crops.[131] The Crop Liens Priorities Act[132] provides that the threshers' lien is entitled to first priority over such claims.

(d) Enforcement of the lien

Enforcement of the lien must occur not later than 60 days after completion of the services. The lien claimant must first give written notice of intention to take sufficient grain to secure payment of the price or remuneration.[133] The lien claimant may then take possession of the grain, and may store it at a public

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127 *Fahlman* v. *MacClean*, [1924] 2 W.W.R. 905 (Sask. C.A.).

128 Threshers' Lien Act, s.2(1). The lien also has priority over a prior section 178 Bank Act security: *Royal Bank of Canada* v. *Erdman*, [1986] 1 W.W.R. 733 (Sask. Q.B.).

129 Section 2(4).

130 Section 2(3).

131 Hail and Crop Insurance Act, R.S.A. 1980, c. H-1, s.18; Municipal Government Act, R.S.A. 1980, c. M-26, s.268; Municipal Taxation Act, R.S.A. 1980, c. M-31, s.129; Irrigation Act, R.S.A. 1980, c. I-11, s.151.

132 R.S.A. 1980, c. C-34.

133 Threshers' Lien Act, s.3.

elevator or at any other place at the thresher's risk.[134] If the lien claimant cannot take peaceable possession of the claim, the lien claimant may enforce the lien by distress[135] A person who has a subordinate lien or charge on the grain is entitled to a statement setting out the amount and kind of the grain threshed and the price charged for the services.[136]

(7) Warehousemen's Lien Act

(a) Origins

The Warehousemen's Lien Act was enacted in 1922.[137] It is based on a uniform Act adopted by the Uniform Law Conference of Canada. Substantially similar legislation has been enacted by most of the other provinces.

(b) Entitlement to the lien

The Warehousemen's Lien Act provides that a warehouseman has a lien on goods deposited with the warehouseman for storage by the owner of the goods or with the owner's authority. The lien also covers goods that are deposited for storage by a person entrusted with the possession of goods of the owner.[138] This means that the lien will attach to goods even though the owner of them may not have authorized the storage of them. It is enough that the owner entrusted the goods to the person who contracted with the warehouseman. The Act defines a warehouseman as a person lawfully engaged in the business of storing goods as bailee for hire.[139] The lien secures lawful charges for storage and preservation of the goods, lawful claims for money advanced, interest, insurance, transportation, labour, weighing, coopering and other expenses in relation to the goods. The lien also secures reasonable charges for any notice

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134 Section 5.

135 Section 7. The procedures set out in the Seizures Act would therefore apply and apply and a sheriff or bailiff would be required to make the seizure.

136 Section 8.

137 S.A. 1922, c. 46.

138 Warehousemen's Lien Act, s.3.

139 Section 1(b).

required to be given under the Act and for notice, advertisement of sale and sale of the goods.[140]

(c) Validity and priority of the lien

The lien attaches to goods deposited with the lien claimant for storage by or with the authority of the owner. It also covers goods deposited for storage by a person entrusted with possession of the goods by the owner.[141] This is subject to a notification requirement which limits the effectiveness of the lien when it is asserted against an owner who did not authorize the storage of the goods.[142] The lien claimant must give notice to the owner of the goods and to any person who has a security interest in the goods that is registered at the time the goods were deposited for storage. The notice must describe the goods and set out the location of the warehouse, the date of deposit and the name of the depositor. It must also contain a statement that a lien is claimed under the Act. If the notice is not given, the lien is void after the expiration of the 2 month period from the date of deposit of the goods.[143]

The warehouseman's lien is a particular lien which only secures charges that relate to the goods in the possession of the lien claimant. It does not create a general lien which secures charges in respect of goods that are no longer in the possession of the lien claimant.[144]

(d) Enforcement of the lien

The Act gives the lien claimant a right of sale by public auction.[145] Before the sale occurs, the lien claimant must give written notice of intention to sell to

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140 Section 4.

141 Section 3.

142 Section 5.

143 *Canadian Imperial Bank of Commerce* v. *Maidstone Farming Ltd.* (1984), 4 P.P.S.A.C. 127 held that the lien loses its priority over a security interest for charges incurred after the 2 month period unless the notification requirement is satisfied.

144 *Squamish Terminals Ltd.* v. *Price-Waterhouse Ltd.*, *supra*, note 20.

145 Warehousemen's Lien Act, s.6.

the person liable for the charges and to the owner of the goods. The lien claimant must also notify any person who has a security interest in the goods that was registered at the time of deposit, and any other person known by the lien claimant to have an interest in the goods. The notice must describe the goods and set out the location of the warehouse, the date of deposit and the name of the depositor. It must provide an itemized statement of the charges. The notice must also contain a demand that the charges be paid on a day not less than 21 days after the notice is given and a statement that the goods will be advertised for sale and sold by public auction at a time and date specified in the notice. If the charges are not paid by the end of the 21 day period, an advertisement of the sale must be published at least once a week for two consecutive weeks in a newspaper published in Alberta and circulating in the locality where the sale will be held. The sale must be held not less than 14 days from the date of the first publication of the advertisement. A failure to comply with the notice requirements does not avoid the lien or invalidate the sale if the provisions have been substantially complied with or if it would be inequitable to avoid the lien or invalidate the sale.[146]

A lien claimant must pay any surplus following the sale to the person entitled to it and provide that person with a statement of account.[147] If a demand for the surplus is not made by the person entitled to it within 10 days or if there are different claims to it or if the right to it is uncertain, a judge may order that the money be paid into the Court of Queen's Bench. The order may be made ex parte and the warehouseman is directed to file a copy of the statement of account with the money.

Any person claiming an interest or right of possession in the goods may satisfy the lien at any time before sale by paying the amount necessary to satisfy the lien.[148] However, the Act provides that the goods should not be delivered to the person who satisfies the lien unless that person is entitled to possession of the goods.

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[146] Section 7.

[147] Section 8.

[148] Section 9.

(8) Woodmen's Lien Act

(a) Origins

The Woodmen's Lien Act was enacted in 1913.[149] British Columbia enacted the legislation in 1888[150], and the statute has been widely adopted in other jurisdictions, including Ontario, Saskatchewan, Manitoba, Nova Scotia and New Brunswick.[151]

(b) Entitlement to the lien

The Woodmen's Lien Act provides that any person who performs any labour or services in connection with any logs or timber within Alberta has a lien on any logs or timber in respect of which the services were rendered. The lien extends to logs belonging to the same owner that have been mixed with logs or timber in respect of which labour or service were rendered. The lien also covers lumber made out of the logs or timber that have not been sold to a bona fide purchaser for value without notice of the lien.[152] The Act defines "person" to include "cooks, blacksmiths, timekeepers, storekeepers, cooks, blacksmiths, artisans and all others usually employed in connection with the labour or services."[153] "Labour" and "services" are defined to include a wide variety of forestry operations as well as associated activities (such as the supply of food).[154]

Several controversies have arisen about the class of persons entitled to claim the lien. The first was whether independent contractors can take the benefit of the lien, or whether only employees could claim it. The Supreme Court of

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149 S.A. 1913(2), c. 28.

150 Woodmen's Lien for Wages Act, 1895, S.B.C. 1895, c. 58, now Woodworker Lien Act, R.S.B.C. 1979, c. 436.

151 Forestry Workers Lien for Wages Act, R.S.O. 1990, c. F.28; The Woodmen's Lien Act, R.S.S. 1978, c. W-16; Woodmen's Lien Act, R.S.M. 1987, c. W190; Woodmen's Lien Act, R.S.N.S. 1989, c. 507; Woodmen's Lien Act, R.S.N.S. 1973, c. W-12.

152 Woodmen's Lien Act, s.5(2).

153 Section 5(1).

154 Section 1(b).

Canada held that the Ontario Act was available only to employees.[155] Cases from Alberta have noted that the Alberta legislation is worded differently and have held that it includes contractors.[156] Although the early cases from British Columbia took a restrictive view and limited the lien to employees, the British Columbia Court of Appeal held that the Act did not distinguish between employees and independent contractors. The test in British Columbia is whether the person had rendered services in relation to the logs.[157] This approach was rejected by the Alberta Court of Queen's Bench. The Court held that a lien may be claimed by a contractor even though the labour and services have been performed by sub-contractors.[158]

Courts have held that the British Columbia Act does not give a lien to a corporation.[159] However, officers or shareholders who actually perform the work may be entitled to assert the claim.[160] This view has been rejected in Alberta[161] and New Brunswick.[162]

The final issue concerns the nature of the labour and services which are secured by the lien. The work must be in relation to the timber or logs in respect of which the lien is claimed. Road building does not qualify as work in relation to the logs or timber,[163] unless it is a necessary incident of a hauling contract.[164]

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155 *Keenan Bros.* v. *Langdon*, [1928] 2 D.L.R. 849.

156 *Peterson* v. *Swan River Logging Co. Ltd.* (1961), 35 W.W.R. 254 (Alta. S.C.); *Desantels* v. *McClellan* (1915), 7 W.W.R. 1221 (Alta. S.C.).

157 *DeCook* v. *Pasayten Forest Products* (1966), 58 W.W.R. 561.

158 *Weldwood of Canada Ltd.* v. *Alberta Export Mills Corp.* (1992), 85 Alta. L.R. (2d) 228 (Q.B.).

159 *Conroy Forest Products Ltd.* v. *Michand* (1969), 71 W.W.R. 553 (B.C.S.C.).

160 *Lewans* v. *Powder Mountain Development Ltd.*, [1971] 2 W.W.R. 456 (B.C.S.C.).

161 *Weldwood of Canada Ltd.* v. *Alberta Export Mills Corp.*, *supra*, note 158.

162 *Acadia* v. *Fleming Gibson Industries Ltd.* (1977), 31 N.B.R. (2d) 482 (Co. Ct.).

163 *Peterson* v. *Swan River Logging Co. Ltd.* (1961), 35 W.W.R. 254 (Alta. S.C.).

164 *Weldwood of Canada Ltd.* v. *Alberta Export Mills Corp.*, *supra*, note 158.

(c) Validity and priority of the lien

A lien claimant has a lien on any logs or timber on which labour or services were rendered and any logs mixed with such logs.[165] This eliminates problems of identification of the logs. The lien may be claimed on a mass of logs arising out of a logging operation so long as it can be shown that some of the logs on which the services were rendered formed part of the mass.

The lien attaches to logs or timber even though the owner may not have contracted with the lien claimant. Furthermore, the lien will continue even if the logs or timber are sold to a good faith purchaser. The only limitation is that a bona fide purchaser in possession of lumber and who has fully paid for it takes free of the lien.[166] The lien is also given priority over all other claims or liens except claims of the Crown for dues or charges.[167]

The lien is subject to a filing requirement. A statement of the lien must be filed in the office of the clerk of the Court of Queen's Bench and a copy of it must be served on the person liable to pay.[168] It must be filed no later than 30 days after the last day that the labour or services were performed. If the labour or services are rendered between October 1 and June 1, the filing must occur on or before June 30 (presumably on the ground that the workers can not get out of the bush during the winter). A failure to file results in the loss of the lien.

(d) Enforcement of the lien

The bulk of the Woodmen's Lien Act is made up of provisions which deal with the enforcement of the lien. These provisions are poorly drafted and contain many gaps. There are two methods by which a lien claimant may enforce a lien under the Act: (1) enforcement by suit, and (2) enforcement by attachment. The Act provides that any person who has a lien on logs, timber or lumber may enforce it by the regular practice and procedure of the Court of Queen's Bench

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165 Woodmen's Lien Act, s. 5(2).

166 Section 5(2)(c).

167 Section 5(4).

168 Section 7.

(enforcement by suit).[169] The proceedings must be commenced within 30 days of the filing of the statement of the lien. The person liable to make the payment is made a defendant. A judge may determine the matter summarily in chambers.[170] The Act provides no further guidance on enforcement proceedings commenced by suit. Legislation and case authority from other provinces indicate that a successful lien claimant will obtain a judgment for the unpaid claim and a declaration that the plaintiff is entitled to a lien. Presumably, the lien claimant then issues a writ of execution and the lien is enforced against the logs or timber in the same manner as a seizure under a writ of execution.[171]

The second method of enforcement is through the writ of attachment. This remedy is available if the lien claim is liable to be defeated by removal of the goods from Alberta, by the defendant absconding or by a loss of identification of the goods.[172] A corroborating affidavit is required. The writ of attachment is then issued by the clerk of the Court. The writ directs the sheriff to seize the timber, logs or lumber.[173] If an enforcement suit has not been commenced, the writ of attachment is treated as an originating process. The defendant and the owner must be served, and they may file a defence.[174] In the absence of a defence, a default judgment may be obtained.[175] If a defence is filed the matter may be determined in chambers or at the next sitting of the Court.[176] The owner of the logs may obtain the release of the logs by posting a good and sufficient bond or by paying the money into Court.[177] If the lien claimant is successful, the Court will direct payment into Court of the money, and in default in payment

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169 Section 10.

170 Section 11.

171 *Warehouse Security Finance Co. Ltd.* v. *Oscar Niemi Limited*, [1944] 3 W.W.R. 567 (B.C.C.A.).

172 Woodmen's Lien Act, s.13.

173 This procedure differs from the writ of attachment as a pre-judgment remedy which must be granted by the Court.

174 Woodmen's Lien Act, ss. 15 and 19.

175 Section 20.

176 Section 22.

177 Sections 18 and 21.

direct that they be sold.[178] In the event of default, the goods are to be sold within 20 days in the same manner as the sale of goods under execution.

The Act also contains procedures that apply to both enforcement by suit and enforcement by attachment. The Act provides that a second seizure may be made under either execution or attachment if the initial seizure is insufficient.[179] The Act prohibits the seizure of logs or timber that are in transit from the place where they were cut to the place of destination.[180] A judge may order that the liens be discharged, that the goods be released or that the security given be cancelled if nothing is found due on the claims.[181]

(9) Beet Lien Act

(a) Origins

The Beet Lien Act[182] was enacted in 1926 during a period in which the government of Alberta was providing incentives to promote the creation of a sugar beet industry in the southern part of the province. The Act creates a non-possessory lien in favour of persons who supply labour or capital to beet growers.

(b) Entitlement to the lien

The Beet Lien Act gives a lien to a person who supplies beet seed or advances money for its purchase or who furnishes labour for the sowing of beet seed or advances money to pay for such labour.[183] The lien secures the value of the seed supplied or the cost of the labour. The amount of the lien is limited to $4.00 per acre.[184] This monetary limit was established in 1926 and has not be changed since that time.

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178 Section 23.

179 Section 14.

180 Section 17.

181 Section 26.

182 S.A. 1926, c. B-3.

183 Beet Lien Act, s.1.

184 Section 2.

(c) Validity and priority of the lien

The Act provides that no document evidencing the lien need be filed or registered and that the lien has priority over every writ of execution, right of distress, encumbrance and charge.[185]

(d) Enforcement of the lien

The Act contains no provisions dealing with the enforcement of the lien. In the absence of a statutory enforcement mechanism, the lien claimant has no right to take possession of the goods without a court order.[186]

D. Other Liens

(1) Unpaid Seller's Lien

A seller of goods has a common law possessory lien which allows the seller to retain the goods until payment of the price. The Sale of Goods Act[187] codified the unpaid seller's lien into statutory form. The lien differed from other common law liens in that the seller enjoyed a right of sale which arose out of the property that the seller had in the goods before its transmission to the buyer.[188] The seller also has a right of stoppage in transit which allows the seller to retake possession of the goods from a carrier on the buyer's insolvency. This exceptional rule allows the seller to assert an unpaid seller's lien that otherwise would be lost because of loss of possession of the goods.[189]

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185 Section 3.

186 See *Prinneveau* v. *Morden* (1913), 4 W.W.R. 637 (Alta. S.C.T.D.) which indicates that a statutory lien claimant does not enjoy a right of sale if it is not provided for in the statute.

187 R.S.A. 1980, c. S-1, ss. 39-43.

188 Sale of Goods Act, R.S.A. 1980, c. S-2, ss. 47-48. And see M.G. Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 685-6.

189 Sale of Goods Act, R.S.A. 1980, c. S-2, ss. 44-46.

(2) Equitable Liens

An equitable lien creates a charge on property until certain claims are satisfied. Unlike a common law lien, an equitable lien does not depend upon continuous possession by the lien claimant. The lien claimant may enforce the lien by judicial sale. An equitable lien is conferred in the following cases: an unpaid vendor of property other than goods has a lien to secure the payment of the purchase price; a purchaser has a lien on money paid to the vendor to secure repayment of the money if the property is not conveyed, and a trustee has a lien on the trust property to secure reimbursement of money expended in carrying out the trust.[189]

A guarantor who pays a debt pursuant to a contract of guarantee has the right to be subrogated in equity to any security the creditor may hold against the debtor. If the creditor has a lien, the right of subrogation to the lien is sometimes referred to as a subrogatory lien.[191]

(3) Maritime Liens

A maritime lien is a claim on a maritime res (a ship, freight or cargo) that secures service done to it or injury caused by it. The lien arises in respect of damage caused by collision, for salvage and for unpaid wages of the master and crew. The lien is governed by its own unique rules which originate out of the law of admiralty.[192]

(4) Crown Liens

Several other statutes create liens in favour of the Crown or other public agencies.[193] All of these are non-possessory liens. The statute usually provides

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[189] Keeton and Sheridan, *Equity*, 2nd ed. (Professional Books Ltd., 1976) at 170-175.

[191] *Halsbury's Laws of England*, 4th ed., vol. 28, (London: Butterworths, 1973) at 224.

[192] *Halsbury's Laws of England*, 4th ed., vol. 43, (London: Butterworths, 1973) at 774-779.

[193] Municipal Government Act, R.S.A. 1980, c. M-26, s.268 (lien on crops to secure commodity advances); Municipal Taxation Act, R.S.A. 1980, c. M-31, (continued...)

that the Crown lien has priority over all other claims. Although these statutes use the terminology of liens, in fact these Crown liens share a greater resemblance to the rights of distress, statutory charges and deemed security interests that are frequently used to secure Crown claims.[194]

E. Effect of the Personal Property Security Act

(1) Application of the Act to Liens

The Personal Property Security Act (the "PPSA") regulates the validity, priority and enforcement of consensual security interests in personal property. The PPSA applies only to security interests which arise out of a security agreement between the creditor and debtor. The Act expressly excludes from its scope a "lien, charge or other interest given by an Act or rule of law in force in Alberta".[195]

The application of this test is not difficult in most cases. If the lien arises by virtue of a statute or through operation of the common law or equity, the lien falls outside the scope of the PPSA. Common law liens in favour of innkeepers, carriers and artificers are therefore excluded, as are all of the statutory liens.

If the lien arises out of an agreement between the parties, the transaction meets the definition of a security interest and is governed by the PPSA. Contractual liens are within the scope of the PPSA because they arise out of an agreement rather than through operation of law.[196] As a result, it is no longer useful to consider contractual liens as separate class of lien. A contractual lien is simply a form of security interest, and therefore it is governed by the PPSA.

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[193](...continued)
s.129 (lien on crops to secure taxes); Irrigation Act, R.S.A. 1980, c. I-11, s.151 (lien on crops to secure arrears); Hail and Crop Insurance Act, R.S.A. 1980, c. H-1, s.18 (lien on crops for unpaid premiums).

[194] See Wood & Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 Alta. Law Rev. 1055.

[195] PPSA, s.4(1)(a).

[196] *John Deere Ltd. and Clarkson Gordon Inc.* (1986), 45 D.L.R. (4th) 641 (Man. C.A.).

The application of the PPSA to general liens is a more difficult issue. General liens usually arise out of a usage of trade. This occurs when the practice of taking a lien becomes so widespread that the parties are presumed to know of its existence. The recognition of such liens has been explained on the basis of an implied term in the contract.[197] General liens are therefore different from common law particular liens in that they arise out of contract rather than through operation of law. On this view, the PPSA should apply to general liens since they fall within the definition of a security interest and do not fall within the exclusion of liens given by rule of law.[198]

The question of the application of the PPSA to general liens is by no means settled. The Ontario Supreme Court has held that a general lien of a stockbroker is a common law lien which is outside the scope of the PPSA.[199] However, in reaching this decision the Court did not consider the important distinction between common law particular liens and general liens.

(2) Priority of Liens

Section 32 of the PPSA contains a priority rule that governs disputes between lien claimants and secured creditors. The section provides as follows:

> Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has with respect to the materials or services has priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have priority.

In most cases, section 32 will apply and the lien will enjoy priority over a security interest. Before the coming into force of the PPSA, a lien was subordinate to a prior security interest, but had priority over security interests that arose after the lien came into existence. There were two exceptions to this principle. First, a statutory lien was often given priority over a prior security

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197 G.W. Patton, *Bailment in the Common Law* (London: Stevens & Sons, 1952) at 345-46.

198 R.J. Wood and M.I. Wylie, *supra*, note 194 at 1055 at 1064-66.

199 *Jones* v. *Davidson Partners Ltd.*, *supra*, note 23.

interest by an express priority provision included in the legislation.[200] Second, a lien claimant was entitled to priority if the secured creditor authorized the dealing.[201] This kind of analysis is no longer required under the PPSA. Section 32 will apply in most cases, and the lien will have priority over all security interests, whether created before or after the lien arises.[202]

In some cases, a priority contest between a lien and a security interest will not be governed by section 32. The provision does not apply if the lien claimant does not furnish materials or services in relation to the goods subject to the lien. An innkeeper's lien would probably not meet this requirement. However, an innkeeper's lien has priority over a prior security interest on the basis of the common law rule which gave the innkeeper a lien on property belonging to a third party.[203] The statutory lien in favour of boarding house keepers and lodging house keepers does not attract this common law rule, and therefore it is subordinate to a prior security interest.[204]

Section 32 provides that the priority of the lien is lost if the other statute provides that the lien does not have priority. The Garagemen's Lien Act provides a good example of such a statute. Section 5 of the Act provides that the lien is postponed to a charge, lien or encumbrance that arises after the garagemen's lien comes into existence but before it is registered.[205]

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200 See, for example, Threshers' Lien Act, s.2(1); Woodmen's Lien Act, s.5(4); Warehouseman's Lien Act, ss. 3, 5(1).

201 *Albemarle Supply Co.* v. *Hind & Co.*, *supra*, note 5; *Continental Bank of Canada* v. *Henry Mogensen Transport Ltd.* (1984), 32 Alta. L.R. 116 (M.C.).

202 See generally, Wood and Wylie, *supra*, note 194 at 1074-77.

203 *Supra*, note 100.

204 *Supra*, note 101.

205 The competing interest holder must be in good faith and without notice of the lien. A literal reading of section might suggest that the garagemen's lien is subordinate to all security interests that arise before registration. However, the Courts have held that it only operates from the time the lien claimant releases possession of the vehicle to the debtor to the time the lien is registered. See *R. Angus Alberta Ltd.* v. *Union Tractor Ltd.*, *supra*, note 61; *Bank of Nova Scotia* v. *Henuset Resources*, *supra*, note 65.

CHAPTER 3 — THE ONTARIO REPAIR AND STORAGE LIENS ACT

A. Introduction

Other common law provinces have experienced a similar piece-meal development of the law relating to liens. Most provinces have passed legislation that creates a right of sale in favour of common law possessory liens. A majority of provinces have enacted legislation that create liens in favour of wood workers and warehouse keepers. The other three western provinces have enacted statutes creating liens in favour of garage keepers. For the most part, there has been little effort to rationalize or modernize the law in this area. Ontario is the only province that has attempted reform. The Ontario Repairs and Storage Liens Act adopts a new and significant approach to liens.

B. Background to the Ontario Legislation

Unlike the western provinces, Ontario did not enact garage keepers legislation. As a result, it was not uncommon for automotive repairers to surrender the vehicle under a bailment agreement in order to preserve the possessory lien.[286] This was a less than ideal substitute for a non-possessory lien. In 1972 the Ontario Law Reform Commission[287] recommended the enactment of a Garage Keepers Act. The proposed legislation was modeled after the legislation of the western provinces. It would have created a non-possessory lien on a motor vehicle subject to the requirement of registration of the lien.

In 1985, the Ministry of the Attorney-General of Ontario issued its *Discussion Paper on Repair and Storage Liens*[288] which contained a draft Act. A somewhat modified version of this legislation was eventually enacted in 1989 as the Repair and Storage Liens Act. The legislation came into force at the same time as the revised Ontario Personal Property Security Act.[289] The legislation goes well beyond the Ontario Law Reform Commission Report. It creates a non-

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286 *Algoma Truck and Tractor Sales Ltd.* v. *Blais* (1981), 1 P.P.S.A.C. 319 (Ont. Dist. Ct.); *Debor Contracting Ltd.* v. *Core Rentals Ltd.* (1982), 44 C.B.R. (N.S.) 9 (Ont. S.C.).

287 *Report on the Non-Possessory Repairman's Lien* (1972).

288 (March, 1985) at 10.

289 R.S.O. 1990, c. P.10.

possessory lien in favour of repairers or storers and applies to all forms of tangible personal property.

C. Ontario Repair and Storage Liens Act

(1) Scope of Act

The Ontario Repair and Storage Liens Act replaced the Mechanics' Lien Act, the Warehousemen's Lien Act and the Unclaimed Articles Act.[210] The Act governs the validity, priority and enforcement of repair and storage liens. Other common law and statutory liens (such as innkeepers liens and woodmen's liens) are not within the scope of the Act. The lien is available to a claimant who repairs or stores an article. The Act defines "article" as an item of tangible personal property other than a fixture.[211] This may be wide enough to include the safekeeping of securities. The repairer's lien is available where the claimant expends money on or applies labour, skill or materials to alter, improve or restore the properties of an article or to maintain its condition.[212] This significantly broadens the class of claimants who may claim a lien. At common law, a claimant had a lien only if the skill or labour enhanced the value of the goods. The claimant did not have a lien if the work merely maintained or preserved the value of the goods.

The Act deals with the availability of a lien when there is a sub-bailment.[213] Suppose that an owner leaves an article for repair with A. A delivers the article to B who carries out the repairs. The Act provides that A is deemed to have performed the services and may claim a lien, and that B does not have a lien. However, if A agreed to act as agent for the owner in forwarding the article to an identified repairer or storer, then B may claim a lien.

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210 S.O. 1989, c. 17, s.37, repealing R.S.O. 1980, c. 261, R.S.O. 1980, c. 513 and R.S.O. 1980, c.529.

211 Repair and Storage Liens Act, s.1(1).

212 See the definition of "repairs" in section 1(1).

213 Section 1(2).

(2) Possessory Lien

The Act provides that a repairer has a lien on the goods repaired and a storer has a lien on the goods stored.[214] The lien is a particular lien which only secures claims for work that relate to goods in the possession of the lien claimant.[215] The lien secures the amount agreed to be paid for the repair or storage. If no amount is agreed upon, the lien secures the fair value of the repairs or storage.[216] The lien arises when the repair is commenced or when the article is received for storage.[217] A repairer who repairs an article that is not in the repairer's actual possession is deemed to have possession when the repair is commenced and is deemed to have given up possession when the repair is completed or abandoned.[218] The lien is discharged and cannot be revived if possession is surrendered or lawfully comes into the possession of the owner.[219]

(3) Non-Possessory Lien

The possessory lien is lost when the lien claimant gives up possession of the article. In its place, the lien claimant gets a non-possessory.[220] The non-possessory lien arises even if the lien claimant has given a period of credit for the payment of the debt.[221] The non-possessory lien is enforceable only if the lien claimant obtains a signed acknowledgment of indebtedness.[222] The legislation does not provide that the lien claimant must get a signed acknowledgment of indebtedness before surrendering the article to the owner. However, a failure to do so will invalidate the lien against a third party who acquires an interest in the

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214 Sections 3 and 4.

215 Section 26.

216 Sections 3(1) and 4(1).

217 Sections 3(2) and 4(3).

218 Section 3(4).

219 Section 5.

220 Section 7(1) and (2).

221 Section 7(4).

222 Section 7(5).

article before the lien claimant obtains a signed acknowledgment of indebtedness.[223] The non-possessory lien is enforceable against third parties only if a claim for lien has been registered.[224] The claim for lien is registered in the registry established under the Ontario Personal Property Security Act, 1989.[225] The registration may relate to more than one article and registration may occur any time after an acknowledgment of indebtedness is signed.[226] The registration expires at the end of the registration period selected by the registrant, but cannot be maintained beyond three years.[227] Information contained in a registration may be amended by filing a change statement.[228] Errors in a registration invalidate it only if a reasonable person is likely to be misled materially by the error or omission.[229]

A non-possessory lien is discharged if the amount of the lien is paid to the lien claimant or paid into Court. It is also discharged upon the order of a Court, upon registration of a change statement recording a discharge, upon expiry of the registration period or upon change in ownership of a vehicle if the lien was not registered before the change in ownership occurred.[230] A lien claimant must file a change statement recording the discharge within 30 days.[231] If the lien claimant who fails to do so is liable to pay the owner $100 and any damages resulting from the failure to register a discharge.[232]

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223 *Hawley Pontiac Buick Cadillac (1983) Ltd.* v. *Heimrath Porsche Service Ltd.* (1991), 6 C.B.R. (3d) 231 (Ont. Gen. Div.).

224 Section 10.

225 Section 9.

226 Section 10(2).

227 Section 10(3). The registration period may be extended by filing a change statement before the registration period expires. See section 10(4).

228 Section 10(7). The change only becomes effective from the time the change statement is registered. See section 11.

229 Section 9(2).

230 Section 12.

231 Section 12(4).

232 Section 12(5).

(4) Priority of Lien

The Ontario Act contains priority rules that govern disputes between a lien claimant and some other claimant who asserts an interest in the article. It also contains priority rules that govern a priority competition between two or more liens.

The simplest case involves a possessory lien. The possessory lien has priority over the interest of all other persons in the article.[233] The possessory lien has priority over security interests and non-possessory liens. The situation is more complex where a non-possessory lien is involved. The non-possessory lien has priority over all other interests except a possessory lien.[234] However, the lien claimant may lose priority if the lien is not registered. The Act provides that a non-possessory lien is enforceable against a third party only if a claim for a lien has been registered.[235] The Act also provides a priority rule where the non-possessory lien is registered but there is a gap between the time when the lien arises and the time when the lien is registered. A person who acquires a right against an article during this gap has priority over the non-possessory lien claimant.[236] This provision does not apply to persons who acquire their interests before the non-possessory lien arises.[237] It is not clear whether a prior secured party who makes a subsequent advance after the non-possessory lien is arises but before it is registered is considered a subsequent third party. It is also unclear whether a seizing creditor or a trustee in bankruptcy may take advantage of this provision if the seizure or bankruptcy occurs when the lien is unregistered.

Priority between two or more non-possessory liens is determined according the reverse order in which the lien claimant gave up possession. The more

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233 Section 6.

234 Section 7(3).

235 Section 10(1).

236 *Ibid.*

237 *General Electric Capital Equipment Finance Inc.* v. *Transland Tire Sales & Service Ltd.* (1991), 6 O.R. (3d) 131 (Gen. Div.). As a result, a lien that is never registered is not enforceable against all third parties. However, if the lien is registered, it is unenforceable only against interests that arise during the gap between the time the goods are released to the debtor and the time of registration.

recently created non-possessory lien therefore has priority.[238] A failure to register the lien will likely not subordinate the lien to other lien claimants so long as registration eventually occurs.

It is not clear if a repairer's lien arises when a person requests the repairs without the authorization of the owner. The Act does not provide that the request must come from the owner. A literal interpretation of the Act would give a repairer priority over the owner. This would represent a change in the common law, which recognized a lien only if the owner expressly or impliedly authorized the work. A storer may claim a lien against an owner who does not authorize the storage. However, the storer must notify the owner or a registered secured party in order to maintain the lien beyond a 60 day period after the article is received.[239] This feature is similar to the notification requirement in the Warehousemen's Lien Act.

(5) Enforcement of the Lien

(a) Seizure of the article

A lien claimant who has a non-possessory lien and who has registered a claim of lien may direct the sheriff to seize the article.[240] The sheriff will seize the article and deliver it to the lien claimant.[241] The power of seizure given by the Act does not prevent the lien claimant from exercising a contractual power of seizure.[242] A lien claimant who has a non-possessory lien can not exercise a right of seizure against a another lien claimant who has a possessory lien.[243] A lien claimant is liable in damages for wrongful seizure if the lien claimant has entered into an agreement for the payment of the debt with the owner and there

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238 Section 16(d),(e).

239 Section 4(4) to (6).

240 Section 14(1).

241 Section 14(2). Section 31 sets out the powers of sheriffs and bailiffs and requires that a court order be obtained before using force to enter a dwelling.

242 Section 14(3).

243 Section 14(4).

has been no default under the agreement.[244] A lien claimant who has a possessory lien does not usually require a power of seizure since the lien claimant almost always has possession of the article. An exception might arise where a lien claimant who has a possessory lien is wrongfully deprived of possession. The Act provides that a possessory lien is lost if the article is surrendered or lawfully comes into the possession of the debtor.[245] It does not provide for loss of the lien if the owner regains possession by unlawful means. At common law, the lien continued and the lien could retake possession of the goods. The Ontario Act does not appear to alter this position.

(b) Sale of the article

A lien claimant has a right to sell an article 60 days after the amount becomes due.[246] The lien claimant may not exercise the right of sale unless the lien claimant has given notice of intention to sell the article.[247] The notice must be given at least 15 days before the sale.[248] The lien claimant must notify the person from whom possession of the article was obtained. If the lien claimant received possession from someone other than the owner, the lien claimant must notify the registered owner in the case of a motor vehicle or the person known to be the owner in the case of other articles. The lien claimant must also notify a secured party or lien claimant who has registered a security interest against the name of the owner or by motor vehicle registration number. The notice must describe the article, state that the article may be redeemed and indicate the amount required to redeem. It must also provide the date, time and place of a public sale or the date after which the goods may be sold by private sale.

The lien claimant may sell the article in whole or in part, by public or private sale, at any time and place, on any terms so long as every aspect of the

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244 Section 15(6).

245 Section 5.

246 Sections 3(3), 4(7), 14(5). In the case of a non-possessory lien, the article must be seized and in the possession of the lien claimant before the sale can be effected.

247 Section 15(1).

248 Section 15(2).

sale is commercially reasonable.[249] The lien claimant may buy the article only at a public sale.[250] A sale by the lien claimant is deemed to be in full satisfaction of the amount owing in respect of the lien.[251] As a result, the lien claimant has no right to sue for any deficiency as an unsecured creditor.

(c) Distribution of proceeds of sale

The Act sets out rules for the distribution of proceeds resulting from the sale of the article.[252] The reasonable expenses of sale and then the costs of seizure are paid out. The proceeds are then applied towards any lien claimant who has a possessory lien and then towards lien claimants who have non-possessory liens in reverse order of the time when the claimants gave up possession.[253] The proceeds, if any, are then applied in payment of any person who has a perfected security interest who was entitled to notice and who has notified the lien claimant of the amount owing under the security agreement. Any remaining surplus is paid to the owner or other person entitled to the article if the lien claimant has knowledge of that person. If a question as to entitlement arises, the lien claimant may pay the money into court.[254]

(d) Retention of article and gift to charity

A lien claimant may propose to retain it in satisfaction of the amount of the lien instead of selling it.[255] The lien claimant must give written notice of this proposal to the same parties who would have been entitled to notice of a sale. The persons entitled to notice may give a written objection to the proposal within 30 days of the receipt of the proposal. If an objection is received during this

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249 Section 15(4).

250 Section 15(5).

251 Section 18(a).

252 Section 16.

253 In order to qualify for this distribution, a registered non-possessory lien claimant who is not conducting the sale must give notice of the amount owing in respect of the lien before or within 10 days after the sale of the article.

254 Section 16(2).

255 Sections 17(1), 18(b).

period, the lien claimant must sell the article or obtain a Court order rendering the objection ineffective.[256] If no one makes an effective objection, the lien claimant is deemed to have irrevocably elected to retain the collateral in satisfaction of the obligation.

As an alternative to retention or sale, a lien claimant may give the article to charity. The lien claimant must have retained the article for at least 12 months after the right to sell an article arose. The article must have a fair value of less than the amount of the lien and estimated expenses of sale. The provision does not apply if the lien claimant has given a notice of intention to sell or a notice of a proposal to retain the article.[257]

(e) Non-compliance with Act

Non-compliance with the enforcement procedures does not invalidate a sale of the article to a good faith purchaser or a gift of the article to a charity.[258] A person who suffers damages as a result of the non-compliance has a right to damages for the actual damages or $200, whichever is greater.[259]

(f) Redemption

An owner or other person entitled to notice may redeem the article by paying the amount required to satisfy the lien.[260] A redemption must occur before the lien claimant has sold the article or contracted for its sale. If the lien claimant proposes to retain the article or give it to charity, redemption must occur before the lien claimant is deemed to have irrevocably elected to retain the article or before it is given to charity.

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256 Section 17(3). The Court may invalidate the objection if the objection was made for a purpose other than the protection of an interest in the property, or the fair market value of the article is less than the amount of the lien together with estimated expenses.

257 Section 19.

258 Section 20.

259 Section 21.

260 Section 22.

(6) Dispute Resolution

Any party may apply to court for a determination of rights where a question arises in respect of a seizure, sale, distribution of proceeds, the amount of a lien or any other matter arising out of the application of the Act.[261] This applies to a dispute between a lien claimant and a third party as well to a dispute between the lien claimant and the debtor.

A special procedure is available if a lien claimant who has a possessory lien refuses to surrender the article and there is a dispute about the amount of the lien. The dispute may concern the quality of the repair or storage, the amount of work that the owner authorized or the right of the lien claimant to retain possession of the article.[262] The applicant may pay the amount of the lien into court or deposit security in that amount, or make an offer of settlement paying into court the amount offered or security in that amount.[263] The clerk of the court then issues an initial certificate setting out the details. The lien claimant must release the article within 3 days of receiving the initial certificate unless a notice of objection is filed.[264] If the lien claimant files a notice of objection, the applicant may pay into court or post security for the further amount claimed and obtain a final certificate. The lien claimant must immediately release the article upon receiving the final certificate.[265] If the lien claimant fails to release the goods as required, the applicant may obtain a writ of seizure directing the sheriff or bailiff to seize the article.[266] The lien is discharged if the article is released or seized. In its place, the lien claimant has a charge on the amount paid into court or security posted.[267] The lien claimant is entitled to a receipt upon releasing possession or upon a seizure, and may obtain the amount offered in settlement if an offer of settlement was made.[268] If there is no offer of

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261 Section 23(1).

262 Section 24(1).

263 Section 24(4).

264 Section 24(5),(6).

265 Section 24(7).

266 Section 24(9).

267 Section 24(13).

268 Section 24(11).

settlement or if the lien claimant does not accept it, the lien claimant must commence action to recover the amount owing within 90 days after the article was released or seized. If the lien claimant does not do so, the lien is discharged.[269]

(7) Rights and Obligations of Lien Claimant

A lien claimant who has possession of an article must use reasonable care in the custody and preservation of it, unless the law imposes a higher standard of care.[270] The lien claimant may recover the commercially reasonable expenses of custody, preservation and preparation for sale of an article.[271] A lien claimant is liable for any loss or damage caused by a failure to meet any obligation imposed by the Act, but does not lose the lien against the article by reason only of that failure.[272] A lien claimant is not generally entitled to use the article.[273]

However, a lien claimant may use the article to preserve its value or for reasonable demonstration purposes to facilitate its sale. The lien claimant may also use it in accordance with a court order or in accordance with any agreement by the owner. Any other unauthorized use renders the lien claimant liable for any loss or damage caused by that use.[274]

(8) Assignment of Lien

The lien claimant may assign a right to a lien by an instrument in writing.[275] A possessory lien becomes effective when the lien claimant delivers possession to the assignee.[276] A non-possessory lien is enforceable against a

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[269] Section 24(14).

[270] Section 28(1).

[271] Section 28(2).

[272] Section 28(4).

[273] Section 28(5).

[274] Section 28(6).

[275] Section 29(1).

[276] Section 29(2).

third party only if a change statement recording the assignment is registered or a claim of lien is registered in the name of the assignee.[277]

(9) Transition

The Ontario Act provides that repairer's liens and warehousemen's liens that came into existence before the coming into force of the new Act are deemed to be possessory liens, and may be enforced pursuant to the Repair and Storage Liens Act or may be enforced under the old law.[278]

D. Innovative Features of the Ontario Act

The Ontario legislation grew out of reform proposals to give repairers a non-possessory lien against motor vehicles. However, the Ontario Act is not simply a copy of the garage keeper's lien legislation enacted in the western provinces. The Ontario Repair and Storage Liens Act displays several innovative and unique features.

The Ontario Act moves towards a unified approach to liens. The statute brings repairer's liens and storage liens within a single statute. For the most part, the same rules governing validity, priority and enforcement of the lien apply to both kinds of liens. However, the Ontario Act falls short of a comprehensive and fully integrated statute. There remain many other kinds of liens (such as carrier's liens, innkeeper's liens and woodmen's liens) which fall outside the scope of the legislation. Another innovative feature of the Ontario Act is its expanded registration capability. The Act does not create a restricted class of goods (such as motor vehicles) in which a non-possessory lien may be claimed. Any possessory lien on tangible personal property may be converted to a non-possessory lien. A total of 4,085 claims of liens were registered in the Ontario Personal Property Registry as of June 25, 1992. A breakdown of how many of these registrations relate to motor vehicles is not available. However, Ontario registry officials indicate that it is their impression that most involve motor vehicles.

The Ontario Act is also the first effort to integrate the law of liens in a jurisdiction where modern personal property security legislation is in force. The

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[277] Section 29(3).

[278] Section 33.

imprint of the PPSA can be detected throughout the repair and Storage Liens Act. The registration provisions are compatible with the approach set out in the PPSA. The enforcement remedies of a lien claimant are very similar to the PPSA enforcement remedies of a secured party under a security agreement.

Finally, there are two other innovative features of the Ontario Act. First, the Ontario Act adopts a reverse order rule to resolve priority disputes between two competing liens. This is premised on a "value-added" principle. The later claimant is preferred over the earlier claimant on the ground that the services provided by the lien claimant adds new value to the article which benefits earlier claimants. Second, the Ontario Act contains a detailed dispute resolution system that prevents a lien claimant from using the leverage of a possessory lien to coerce payment where there is a dispute about the amount of the lien.

CHAPTER 4 — THE GENERAL PRINCIPLES OF REFORM

A. The Need for Reform

(1) Growing Obsolescence of the Law

The growth of the law of liens in Alberta is closely connected with the economic development of the province. The early rural economy of the province is reflected in the first lien statutes which created liens in favour of livery stable keepers and threshers of grain. The Woodmen's Lien Act was enacted in 1913 upon the emergence of a logging industry. The Beet Lien Act was enacted in 1926 as part of a provincial effort to establish a beet industry in the south of the province. As transportation systems and commerce grew, a statutory lien was enacted in favour of professional warehouse keepers. With the widespread popularity of the automobile and the increased availability of sophisticated farm machinery, a non-possessory statutory lien was enacted in 1937 in favour of mechanics who repaired these machines.

At this point legislative activity in the field comes to an end. There has been no significant legal developments in the area for the last 60 years. Perhaps this is because of the growing acceptance and use of secured credit. Instead of lobbying government for special legislation creating a lien, the parties could simply execute a security agreement. In any event, the whole subject matter of liens subsequently fell into a state of neglect. Two extreme examples amply demonstrate the magnitude of this problem. Section 7 of the Livery Stable Keepers Act provides that a stable keeper must clean the stable with a solution of bichloride of mercury. Although this substance was once widely used, it was later found to be unsafe and has since been banned. The lien created under the Beet Lien Act is subject to a monetary limit of $4 per acre. This monetary limit has not been altered since its enactment in 1926. Inflation has made the statute a dead letter.

In some cases, statutory obsolescence has become a critical problem. The Woodmen's Lien Act was enacted at a time when the forest industry consisted of "rough, hardy men in the woods armed with their axes and assisted by their horses, cutting great trees and skidding them to the sawmills where they were cut

into timber".[279] The statute did not anticipate the massive mechanization that would radically change the nature of the industry. Despite the technological advances in the forestry industry, the statute continues to refer to blacksmiths, cooks and timekeepers who formerly populated the lumber camp and sweeps us back nostalgically to another era. A judge, commenting on a similar statute in British Columbia, stated:[280]

> It is clear that the scope of the statute and the protection it affords to those who work in the forest industries have not kept pace with the great changes that have occurred in the methods of production of forest products and the enlargement of the occupations involved therein. It would not seem remiss if our legislators could give some thought to modernization of this remedial and protective statute . . .

Justice Milvain of the Supreme Court of Alberta made the following comments on the need for revision of the Alberta Act:[281]

> I want to say that the terms of *The Woodmen's Lien Act* brings one to the conviction that this is another piece of very badly drafted legislation and is much in need of revision. It is full of possible difficulties of quite gigantic proportions.

The problem of obsolescence is not restricted to statutory liens. The common law possessory lien is an ancient concept, and the law which governs it shares the prejudice of the common law against assignments of legal rights. In most modern contexts this feature has been altered by the statute or by the intervention of equity.[282] However, liens continue to be governed by the common law which refused to recognize an assignment of the lien to a third party. This can produce unacceptable results in a modern commercial setting.

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279 *DeCook* v. *Pasayten Forest Products Ltd.* (1966), 58 W.W.R. 561 at 566 (B.C.C.A.).

280 *Ibid.*, at 567.

281 *Peterson* v. *Swan River Logging Co. Ltd.* (1961), 35 W.W.R. 254 at 256 (Alta. S.C.).

282 Judicature Act, R.S.A. 1980, c. J-1, s.21.

For example, an individual repairer cannot transfer the right to a lien on repaired goods as part of a sale of the business to a third party.

(2) Lack of Uniformity

All liens share a common attribute: they give the lien claimant an interest in certain items of property of the debtor in order to secure payment of money. Despite this common purpose, the existing law is a complex mixture of special statutes and common law principles. The enactment of the Possessory Liens Act in 1921 was an attempt to create a partial statutory consolidation of the law of liens, but this effort was quickly overshadowed by the creation of new statutory liens. As a result, each type of lien is subject to its own special set of rules. The legal rules that govern the lien of a warehouse keeper differ from the rules that apply to a lien in favour of an agister, which in turn differ from the rules that apply to the lien of a stable keeper.

There are several important efficiencies that can be gained through uniformity. A system of law that provides a single set of rules produces a more predictable commercial environment. The cost of determining the validity, priority and method of enforcement is reduced. A common set of forms and procedures can be developed for use by all lien claimants. Decisional law which resolves ambiguities in the scope and operation of the legislation gains a wider applicability. This reduces the need for costly litigation to resolve issues of law.

(3) Limited Scope of the Registration Option

Under the common law, surrender of the goods by the lien claimant destroyed the lien. There may, however, be good practical reasons for wishing to give up possession while maintaining the lien. The surrender of possession of the goods to the debtor allows a lien claimant to avoid incurring the costs of storage. Storage costs can be considerable when the lien covers larger items such as automobiles. The debtor gets the use of the item, which may increase the likelihood of payment if the item is necessary to the debtor's business or employment. Lien claimants have sometimes tried to circumvent this problem by surrendering the goods to the owner under a bailment agreement. Under this arrangement, the owner agrees to hold the goods as bailee or agent of the lien claimant. This solution is far from ideal. Although this device is permitted under the common law, it has the potential for misleading third parties who deal with

the owner. These third parties have no means of discovering the existence of the lien.

The Garagemen's Lien Act was an early response to this problem. It permits a lien claimant to surrender a vehicle without losing the lien through the creation of a non-possessory lien. The lien must be registered, and this provides third parties with the means of discovering the existence of the lien. The Act limits the non-possessory lien to motor vehicles and farm vehicles. The restricted scope of the registration option has caused problems. The Garagemen's Lien Act does not apply to trailers.[283] A credit manager of a company that manufactures truck trailers was of the view that the exclusion of trailers Act creates unfair discrimination between truck manufacturers and trailer manufacturers in the freight transportation sector.

The restricted scope of the Garagemen's Lien Act was in part due to the limited capability of the personal property registry system at the time the legislation was passed. Recent advances in computer technology has led to the centralization of the registries and the use of a powerful computer which gives rise to an extensive registration and search capability. There is no longer any reason why the registration option must be limited. The registration option can be extended to all goods subject to a lien.

(4) Lack of a Uniform and Rational System for Enforcement

There are two major problems with the procedures for enforcing a lien through sale of the goods under the present law. The first is that the various statutes provide different rules and procedures governing notification of the intended sale, the manner of sale and the distribution of proceeds. For example, the Warehousemen's Lien Act, the Livery Stable Keepers Act and the Innkeepers Act require sale by public auction. These statutes provide different periods for commencement of sale proceedings and different notice and advertising procedures. The Possessory Liens Act requires that the lien claimant obtain a Court order prior to sale. The Possessory Liens Act and the Garagemen's Lien Act contain different methods through which a debtor may object to the claim of

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[283] The definition of "motor vehicle" in the Garagemen's Lien Act does not cover trailers. In addition, it has been held that the definition does not cover a motor boat. See *Province of Alberta Treasury Branches* v. *R. in Right of Alberta* (1984), 32 Alta. L.R. (2d) 306 (Q.B.).

a lien. The other statutes are silent on this matter and therefore the debtor must commence court proceedings to raise the objection.

The second major problem concerns the method of sale. Statutes that require sale by public auction may produce a lower recovery than might otherwise be obtained. For example, an operator of an equine centre commented upon the low recovery from the sale of a horse by public auction under the Livery Stable Keepers Act. The amount of sale proceeds recovered at the auction is often little more than the cost of conducting the public auction. She was of the view that the lien claimant could recover a higher amount through a private sale. In the past, the public auction was the normal enforcement remedy available to creditors. Low recovery rates have led to a rethinking of this approach. The Personal Property Security Act gives secured creditors the right to sell the collateral by private sale or public sale.[284] The Alberta Law Reform Institute has recommended that the private sale option also be available to an unsecured creditor as a judgment enforcement remedy.[285] The enforcement remedies available to lien claimants should provide a similar option.

(5) Lack of Compatibility with the Personal Property Security Act

The Personal Property Security Act creates a comprehensive system of law that governs the validity, priority and enforcement of consensual security interests in personal property. It addresses the problem of ostensible ownership that arises when a creditor has taken an security interest in the debtor's property. Third parties who deal with the debtor will risk loss unless there is some practical means through they can discover the existence of the security interest. A basic premise of the PPSA is that a security interest should be enforceable against third parties only if the secured party has taken steps to give publicity to the fact that a security interest has been taken.

There are two methods by which this "notification to the world" can be accomplished under the PPSA. The first is for the secured party to take possession of the collateral. The disadvantage of this method is that the debtor is deprived of the use of the property while the secured party has possession of it. The second method is by registering a notice of the security interest in a

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[284] Section 60(2).

[285] *Enforcement of Money Judgments*, vol. 2, Report No. 61 (Edmonton: 1991) 105-107.

public registry. A failure to take either of these steps prevents the secured party from asserting the security interest in the collateral against certain classes of third parties.[286] It does not invalidate the security interest as against the debtor since the step is merely intended to give notice to third parties.

The PPSA employs the concept of "perfection" to produce this outcome. A secured party may perfect a security interest by registration.[287] The secured party may register a security interest by filing a financing statement in the Personal Property Registry. Alternatively, a secured party may perfect a security interest by taking possession of the collateral.[288] This is referred to as perfection by possession. Under the common law, a person could have possession even though that person did not have physical control of the property. This is sometimes referred to as "constructive possession". A secured party could keep possession in law even after surrendering control of the goods to the debtor under a bailment or agency agreement. Under this arrangement, the debtor agrees to hold the property on behalf of the secured party as bailee or agent. The PPSA rejects this notion since it would defeat the notification function of possession.

Many of the policies underlying the present law of liens are in conflict with the underlying policies of the PPSA. The most obvious example is the creation by statute of non-possessory liens that are not subject to a registration requirement. Another example is the common law recognition of constructive possession which allows a lien claimant to maintain a lien after surrendering the goods to the debtor. This is completely at odds with the PPSA philosophy that third parties should have a means of discovering the existence of a security interest.

Even in the case of the Garagemen's Lien Act which imposes a registration requirement in relation to the non-possessory lien, there are significant differences in the implementation of this policy. Registration of the lien within the 21 day period is essential to validate the lien as against the debtor.[289] It is difficult understand why this should be the case, since the only reason for registration is

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[286] PPSA, section 20.

[287] Section 25.

[288] Section 24.

[289] Garagemen's Lien Act, s.3(1).

to notify third parties of the lien. Indeed, the most frequently raised complaint about the present registry system is that the 21 day cut-off is unfair and arbitrary. A second irritant is that the information in a garagemen's lien registration can not be amended without an order of the Court. This is an expensive and unnecessary process. The PPSA provides a simple method of amendment, and the same method could easily be used to amend information about a lien.

The PPSA attempts to foster a more stable and predictable commercial environment by providing a system through which information about the existence of security interests in personal property can be cheaply communicated to interested persons. This information is rendered less useful if it does not reveal the existence of secret liens.

B. The Goals of Reform

The first goal of reform is the creation of a rational and uniform set of rules which would apply to the different classes of liens. Features of the existing law that have become archaic or obsolete should be identified and removed. The same set of rules should apply to all classes of liens unless there is some special reason that justifies a difference in treatment. These rules should set up a single source of law that would govern the validity, priority and enforcement of liens. The system should contain an expanded registration option which would permit a lien claimant to protect the lien through registration instead of maintaining possession of the lien. It should also contain a streamlined system for enforcement which reduces the costs of disposal of the goods in order to ensure an increased recovery on default.

A second goal of reform is the co-ordination of the law of liens with the concepts and approach of the PPSA. The reform measures should seek to enhance the integrity of the registry system by providing a means through which third parties can determine if personal property is subject to a lien. The reform measures should also seek to adopt common approaches and terminology on such matters as perfection, registration procedures and enforcement remedies.

C. Options for Reform

(1) Option #1: Abolition of Liens

One option is simply to abolish all common law and statutory liens. Liens have the same function as security interests and one may argue that they should be governed by the PPSA. This would have the advantage of fully integrating the two bodies of law. It would not place a onerous burden on lien creditors. A possessory security interest does not require the execution of a written security agreement under the PPSA. Nor is registration required because the security interest is perfected by possession. If the creditor wished to release possession to the debtor, the creditor would need to enter into a written security agreement with the debtor. The security interest would also need to be registered in order to protect the security interest as against third parties.

We do not endorse this alternative because we believe that it would create uncertainty and result in an increase in litigation. It would be necessary in every case to examine if the parties intended to create a security interest or if owner left the goods with the repairer or other claimant for a more limited purpose. The present law operates as a kind of presumptive rule. It assumes that certain classes of creditors who are in possession of goods of the debtor would have negotiated a security interest. The parties may expressly contract out of this presumptive rule by waiving the right to a lien. We think that this presumptive rule accords with the expectations of the majority of people. Most people would anticipate that the bargain between a repairer and a customer would contain a term that the customer would not be entitled to obtain possession of the goods until the services were paid. The approach would also prove unsatisfactory in the case of woodworker's liens and thresher's liens where the lien claimant does not have possession of the property in the first instance.

The approach is also problematic in that the simple abolition of the concept of liens would raise new priority problems. It has been a consistent policy of both the common law and statute law to give liens priority over prior secured parties. The willingness to do so appears to proceed from the view that it is justified because of its tendency to add new value to the goods thereby benefiting the prior secured party. This policy could not be maintained by simply abolishing the lien as a legal concept.

(2) Option #2: Integration of Liens into the PPSA

A second approach is to deem liens to be security interests for the purpose of the PPSA. The priority rules and realization procedures of the PPSA would then apply to the deemed security interest. This approach is not foreign to the PPSA: true leases, non-security assignments of accounts and commercial consignments are deemed to be security interests.[290] The lien could be perfected by possession, but the lien claimant could also release possession of the goods to the debtor if the security interest were registered. Modifications could then be made to the PPSA priority rules to maintain the priority status afforded to liens.

This approach would have the advantage of bringing liens fully into the framework of the PPSA. On balance, we hesitate to recommend this approach. A major effort has been made to produce uniform personal property security legislation in Canada. There is a very high degree of uniformity in Alberta, British Columbia and Saskatchewan, and other Canadian provinces such as New Brunswick are preparing to enact similar legislation. Integration of the proposed measures into the PPSA would require substantial change to the PPSA and would therefore result in a loss of uniformity.

(3) Option #3: Implementation through a Separate Statute

A third alternative is to implement the proposals through a separate statute which would regulate the validity, priority and remedies of common law and statutory liens. The legislation would be designed to mesh properly with the PPSA, and many of the key concepts of the PPSA would be incorporated into the legislation. For example, the procedure for realization of the goods would be modelled upon Part 5 of the PPSA. We prefer this method of implementing the proposals for reform. We note that this was the method chosen by the province of Ontario in its enactment of the Repair and Storage Liens Act. Although our proposals differ from the provisions of the Ontario legislation in several key areas, we are of the view that reform through a single statute devoted to liens is the best legislative means of implementing reform.

A variation of this approach is to enact a separate statute which deems a lien to be a security interest for the purposes of the PPSA. The statute would incorporate by reference the priority rules and the enforcement remedies of the

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[290] PPSA, section 3(2).

PPSA. One advantage of this approach is that the reform could be accomplished in a short statute. The disadvantage of this approach is that it would create added complexity for the lien claimant. The lien claimant would have to sift through two statutes in order to determine the applicable law. In addition, there are many provisions of the PPSA which would not be applicable to liens. We think that the statute should precisely identify which provisions of the PPSA are intended to apply. We think that this is best accomplished by a statute provides a single source for the relevant rules and procedures.

RECOMMENDATION 1 — ONE STATUTE

Non-consensual liens in personal property should be governed by a single statute. The statute should set out a unified set of rules concerning the nature and extent of the lien, the priority of the lien against third parties and the procedure for its enforcement. The statute would replace the following legislation:

Garagemen's Lien Act
Innkeepers Act (ss 2-6)
Livery Stable Keepers Act
Possessory Liens Act
Threshers' Lien Act
Warehousemen's Lien Act
Woodmen's Lien Act

The same rules would apply to the various types of liens unless there is a good reason that justifies a difference in treatment.

D. Scope of the Project

We have concluded that it is not possible to encompass all non-consensual security devices within the proposed law. There are many devices in addition to liens which have a security-like function but fall outside the scope of the PPSA. These include rights of distress, statutory charges and deemed statutory trusts. Many of these devices are for the benefit of the Crown or quasi-governmental bodies such as municipalities and boards. An unfortunate feature of this proliferation of statutory provisions is that it produces a highly complex system of law. This produces significant uncertainty over issues of priority and enforcement. Despite this uncertainty, we thought it unwise to attempt to deal

with these matters in a statute which was primarily designed to regulate non-governmental liens. The solutions proposed in relation to private liens are simply not appropriate to these devices. There are several special problems associated with Crown liens and other similar devices, and we have come to the view that our proposals cannot be extended to them. Accordingly, our proposals are restricted to liens in favour of private persons.

The system that we propose is only appropriate for non-consensual liens in personal property. Therefore liens on real property and construction liens are outside of the scope of the project. The landlord's right of distress for unpaid rent also falls outside the scope of this project. The landlord's right to distress operates on a different basis than a lien. In addition, there are policy considerations that would need to be addressed in the reform of the landlord's right of distress are very different from those relating to liens. We think that the remedy could not be easily accommodated in a statute governing private liens.

Finally, we do not propose that the statute affect the unpaid seller's lien as provided for in the Sale of Goods Act. The unpaid seller's lien differs from the other possessory liens in that enforcement of the lien through sale revests the property in the seller (the unpaid seller therefore sells the goods as owner rather than as creditor). The existing law governing the unpaid seller's lien has been designed to operate in the context of sales law. We think that sale of goods law is better suited to this specialized task than the proposed lien legislation. Therefore we recommend that the lien remedy of an unpaid seller continue to be governed by sale of goods legislation.

The status of general liens under the present law is uncertain. General liens in favour of factors, stockbrokers, bankers and solicitors have been recognized as arising out of usage. It is possible that these liens are governed by the PPSA since they are essentially contractual in nature. In the case of banker's liens and factor's liens, it is also possible that the lien is no longer available. General liens are recognized only so long as there is a "course of dealing so general and so uniform that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage"[291] The trade practices which gave rise to the factor's lien have since disappeared. A leading treatise on banking law indicates that "[b]anking practice has changed to the extent that

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[291] *Bleaden* v. *Hancock* (1829), 4 C. & P. 152 at 156.

Canadian banks now seldom appear to be in a position of claiming or having to rely upon the traditional banker's lien".[292]

In any event, we think that the proposed statute should not make provision for general liens. Although we prefer the view that general liens are merely a form of consensual security interest that fall within the scope of the PPSA, we think that this is one of many issues of scope which must be resolved by the judiciary.

RECOMMENDATION 2 — NON-APPLICATION OF PROPOSED STATUTE

The statute should not apply to Crown liens or other non-consensual security interests given to public or quasi-governmental bodies, to general liens, to the landlord's right of distress for unpaid rent or to an unpaid seller's lien governed by the Sale of Goods Act.

E. Transition

We are recommending a substantial change to the law governing liens. This raises the issue of liens that came into existence prior to the coming into force of the proposed statute. We think that a simple rule should be adopted in connection with transitional issues. The proposed statute should apply to all liens that are still in effect after its coming into force. This would let existing lien claimants take advantage of the expanded registration option. It would also require that existing lien claimants enforce their liens in accordance with the proposed enforcement procedure. A lien validly registered under the Garagemen's Lien Act should be deemed to be registered for the unexpired portion of the registration. The registration should be capable of being continued under the proposed statute through registration of a financing statement. The registration could then be renewed through the same method of renewal used for liens that arise after the coming into force of the statute.

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[292] Crawford & Falconbridge, *Banking and Bills of Exchange*, Vol. 1, (Toronto: Canada Law Book, 1986), at 779.

RECOMMENDATION 3 — TRANSITION

The proposed statute should apply to liens that were created before its coming into force. A non-possessory lien under the Garagemen's Lien Act should be considered registered until the registration expires. The proposed statute should provide that a garageman's lien may be re-registered in the Personal Property Registry before the registration expires.

CHAPTER 5 — NATURE AND EXTENT OF THE LIEN

A. Introduction

The purpose of this chapter is to set out recommendations on the nature and validity of a lien. The discussion will centre upon the following questions: who may claim a lien? to what property does the lien attach? what debts are secured by the lien? what formal steps are needed to validate a lien? when does the lien come into existence? when does it cease to exist? The chapter will also examine two important duties of lien claimants. The first is the duty to take proper care of goods in the possession of the lien claimant. The second is the duty to provide information about the lien to the debtor and to interested third parties. Finally, the chapter will discuss the right to assign a lien.

B. Abolition of Obsolete Liens

We recommend the repeal of the Beet Lien Act. Our research shows that it has fallen out of use. The monetary limit of $4 per acre has not been changed since its enactment in 1926. Furthermore, the statute creates a non-possessory lien that does not require registration or other form of public notice. This is contrary to a basic policy underlying modern personal property security law.

RECOMMENDATION 4 — ABOLITION OF OBSOLETE LIENS

The Beet Lien Act should be repealed.

C. Persons Entitled to Liens

In Chapter 2 of this Report for Discussion, we describe the present law of liens in Alberta. In Chapter 4, we make the argument in favour of a single statute which would modernize the law of liens. At this stage, we consider the issue of entitlement to liens. This is a vital question. A lien places a lien claimant in a position superior to that of other creditors. The lien claimant has a more powerful remedy as against the debtor. The lien claimant does not have to commence action and obtain a judgment as do other unsecured creditors. Nor is the lien subject exemptions which limit seizure under a writ of execution. A lien claimant also enjoys a preferred status vis a vis other creditors. A lien claimant usually has first priority to the proceeds of sale of the goods subject to the lien.

Our goal is to develop some criteria or approach for determining which claims should have the special advantages of a lien. No single theory or philosophy underlies the present law of liens. The common law justified the innkeeper's lien and the common carriers' lien as a reciprocal right that arose from a common calling. The right to claim a lien compensated the lien claimant for having to provide services to all customers who were willing to pay. Repair and storage liens can be justified on the basis of an implied contract theory. These liens accord with the normal expectations of the parties to the contract. In most cases, the customer would not expect to receive delivery of the goods unless payment for the services is tendered. In other cases, the enactment of the statute were in response to particular needs in a sector of the economy. For example, the Woodmen's Lien Act was originally a form of wage protection legislation for forestry workers.[20]

We have identified two approaches on the issue of entitlement to liens. The first is to adopt a conservative approach. Under this approach, the existing classes of liens would be retained as far possible. The decision to expand the classes of liens or to abolish a certain kind of lien would be left as a policy decision. The proposed statute would not attempt to assess which claimants should have liens. It would simply provide a modernized and rationalized system of law governing liens.

Under this first approach, the proposed statute would recognize the existing classes of liens. The statute would recognize the common carrier's lien, the innkeeper's lien and the thresher's lien. The woodmen's lien would be retained but renamed as a forestry worker's lien. Some consolidation of the classes of liens is nevertheless possible. The various storage liens (the warehousemen's lien, the stable keeper's lien and the bailee's lien) could be subsumed within a single category of storage lien.

A policy of retaining existing classes of liens is more difficult to accomplish in relation to artificer's liens. Under the present law, a lien is available only if the artificer has possession of the goods. A repairer who performs work on the owner's premises therefore does not have a lien. The Garagemen's Lien Act provides an exception to this rule. A repairer who works on a motor vehicle or a farm vehicle has a lien on the vehicle even though the repairer never had

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[20] Our research indicates that because of changes in forestry practices, the woodmen's lien is now predominantly used by contractors or sub-contractors rather than by employees.

possession of it. The lien ends 21 days after the repairer completes the work unless the repairer gets a written acknowledgment of indebtedness and registers within this period. We do not think that it is feasible to preserve this feature of the Act. The proposed statute should not draw distinctions based upon the kinds of goods involved. Nor should it differentiate between work that enhances value and work that merely maintains or preserves value. These distinctions have led to unfairness and uncertainty under the present law. We think that they should be eliminated since they do not serve any useful purpose. Given this constraint, the goal of retaining existing categories of liens can best be achieved by recognizing a lien only when an artificer takes possession of the goods.

The second approach is to seek some underlying principle which could be used to determine which classes of claimants should receive the benefit of a lien. Under the present law, the major distinction is between possessory liens and non-possessory liens. However, a feature that is common to most liens is that they secure money owing for services which enhance or preserve the value of the goods. The proposed statute might therefore recognize that it is the adding of value rather than the fact of possession which should entitle a claimant to a lien. Under this approach, possession would be significant only as a method of perfecting the lien so as to give notice of its existence to third parties. The Ontario Discussion Paper on Repair and Storage Liens[284] originally proposed that a lien be available only if the lien claimant had possession of the article. The lien claimant could later surrender possession of the article to the debtor and claim a non-possessory lien. However, this option would only be available if the lien claimant had possession in the first instance. Mr. Arthur Close, Q.C., in an extensive review of the Ontario proposal, took the view that the requirement of possession should be eliminated:[285]

> The second observation . . . is that in order to claim a non-possessory lien, the lien claimant must once have had a possessory lien. This is a serious limitation . . . . There are many situations in which work will be carried out on the premises of the owner. An example is where a piece of heavy equipment breaks down at a remote work site and it is wholly impractical to relocate it to the repairer's premises. It is doubtful

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284 *Supra*, note 208 at 23.

285 A. Close, "Commentary - Ontario Ministry of the Attorney-General: Discussion Paper on Repair and Storage Liens", [1985] 10 C.B.L.J. 359, at 364.

> whether the person who performs the repairs at a place which is under the effective control of the owner of the property being repaired can ever be said to have possession of the property sufficient to support a lien. Yet to deny him a non-possessory lien creates a wholly artificial distinction between work which is lienable and work which is not, depending on the essentially irrelevant issue of where the repairs are made.

The Ontario Ministry of the Attorney-General was apparently convinced by this argument. The legislation which was passed eliminated the requirement of possession.

Proponents of the second approach regard it as a logical step in the development of the law. A major recommendation in this Report for Discussion is that registration of a lien should be a substitute for possession. This shift away from the requirement of possession implies that possession is no longer a crucial element. A relaxation of the requirement of possession is merely an extension of the approach taken in the Garagemen's Lien Act. The Act gives a repairer a lien even if the repairer does not have possession of the vehicle.[286] There is one limitation. The repairer must get a signed acknowledgment of indebtedness and register the lien within 21 days after completing the repairs. This is essentially the same approach as adopted in Ontario, except that in Ontario the lien is not limited to vehicles.

The second approach does not provide a universal justification for liens. It is difficult to bring the common carrier's lien and the innkeeper's lien within this notion. The justification can perhaps be extended to carriers. The carriage of goods usually involves taking the goods to market which increases their value. It may also be argued that there is an element of storage involved in relation to an innkeeper's lien. However, we think that the "value-added" justification should not be pressed too far. We think it sufficient that it provides a partial theory that underpins most liens.

This second approach would substantially expand the classes of claimants entitled to liens. For example, a veterinarian who inoculated cattle would have a lien on them. A repairer who makes a house call to fix a broken washing machine would have a lien on it. The approach is open to criticism on the

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[286] Garagemen's Lien Act, s. 3(1)(b).

ground that an expansion of the classes of liens is unwarranted.[297] The enactment of modern personal property security legislation in Alberta has made it relatively easy for a creditor to obtain a security interest. Opponents of the second approach may argue that liens are anachronistic and reform measures should not increase the number of special preferences. On this view, the proper goal of reform is to streamline the law so that every creditor has a simple choice between extending credit on a secured or unsecured basis. The counter-argument is that existing personal property security legislation alone is inadequate in that it does not provide a super-priority over prior security interests for persons who provide services that enhance or preserve value.[298] Without such a feature, it can be argued that the expansion of the classes of liens is fully justified.

We are particularly interested in receiving comments on this issue. To assist discussion we provide two alternatives. The recommendations and the draft legislation implement the second approach. However, an addendum immediately following the draft legislation sets out alternative recommendations and legislation that would carry into effect the first approach.

RECOMMENDATION 5 — ENTITLEMENT TO A LIEN

The following classes of lien claimants should be recognized:

(a) a person has a lien on goods in respect of which the person has expended labour or skill for the purpose of improving, restoring or maintaining its condition or properties;

(b) a storer has a lien on goods that have been stored;

(c) a common carrier has a lien on goods for carriage charges in respect of which a bill of lading is issued;

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297 The Ontario Repair and Storage Lien Act is somewhat ambiguous on this point. The Act gives a lien to a person who repairs an article. Repairs are defined as "an expenditure of money on, or the application of labour skill or materials to, an article for the purpose of altering, improving or restoring its properties or maintaining its condition. This is much wider than the normal meaning of repairs.

298 A. Close, *supra*, note 295 at 371-73.

(d) an innkeeper, boarding house keeper or lodging house keeper has a lien on the goods brought on to the premises;

(e) a thresher has a lien on any grain that has been cut or threshed.

(f) a forest worker has a lien on logs or timber in respect of which labour or services are rendered and any logs or timber which have been mixed with logs or timber in respect of which the labour or services have been rendered.

D. Obligation Secured by the Lien

The debt secured by the lien should be limited to claims for services rendered in relation to the goods against which a lien is claimed. Thus, the proposed statute would create a particular lien as opposed to a general lien. Under the system that we propose, a lien would have priority over prior security interests and prior liens. We think that this is only justifiable where the services tend to preserve or enhance of value of the goods. This would not represent a change in the law. All of the liens that would be brought within the proposed statute are particular liens.

In the past, the absence of a general lien has been inconvenient for certain types of businesses. For example, the lien of a warehouse keeper for storage of goods only covers storage charges for goods remaining in the possession of the warehouse keeper. If the warehouse keeper releases possession of the goods to the debtor, the lien is lost. This problem is partially remedied by the proposal to expand the registration option. The lien claimant may release possession of the goods to the debtor and protect the non-possessory lien by registration. However, this would not protect the lien claimant in all cases. The lien claimant will lose the lien if the debtor sells the goods to a buyer in the ordinary course of business. In any case, the parties may choose to create a security interest that secures all outstanding obligations if the lien is thought to be inadequate.

In some cases, the parties may not have agreed upon a specific amount of payment for the services. Where this is the case, the lien should secure the fair value of the services.

RECOMMENDATION 6 — OBLIGATION SECURED BY LIEN

The claim secured by the lien should be restricted to the amount agreed to be paid for the services relating to the property against which the lien is claimed. If no amount has been agreed upon, the lien should secure the fair value of the services rendered.

E. Goods Belonging to Third Parties

Under the present law, the enforceability of a lien against the property of a third party depends upon the kind of lien involved. An innkeeper or a common carrier can claim a lien even though the goods are owned by some third party. The reason for this rule was that the innkeeper and the common carrier were obliged by law to provide services to those willing to pay. A warehouse keeper may claim a lien against the goods of a debtor, and also against any goods entrusted to the debtor by the owner. This would not cover stolen goods, but it would cover cases in which the owner consented to possession by the debtor. In practice, this right to claim a lien against third parties is limited. The lien claimant must notify the owner of the lien within two months of receiving the goods. A failure to do so will invalidate the lien against the third party in relation to charges arising after the 2 month period. The Woodmen's Lien Act permits a lien claimant to assert a lien against logs or timber even though there is no contract between the lien claimant and the owner. The lien claimant has a lien against the owner's logs or timber even though it is a contractor rather than the owner who did not pay. With other liens, the general rule is that a lien claimant can only claim a lien against the goods of the owner, unless the owner authorized the debtor to obtain the services giving rise to the lien.

We start with the proposition that there is little justification for permitting a lien to be claimed against goods of a third party who has not authorized the transaction. The conventional explanation for this special right in favour of carriers and innkeepers is that such persons are engaged in a common calling and obliged by law to accept goods. This argument does not provide a convincing reason for placing the risk of loss on the owner, particularly since innkeepers and carriers are in businesses that can easily spread the impact of this kind of loss.

We therefore recommend that a lien claimant should only have a lien against the goods of the debtor. The lien claimant should not have a lien against

the goods of a third party unless the third party authorized the transaction. However, a secured party should not be considered to be an owner, and priority between a secured party and a lien claimant should continue to be governed by section 32 of the PPSA.

We think that an exception to this rule should be made in relation to forestry workers' liens. It is not uncommon for the owner of land to contract out the timber harvesting operations to a contractor. The contractor will engage workers or sub-contract portions of the operation out to other persons. The sub-contractor may in turn engage workers or enter into further sub-contracts. Under the present law, a sub-contractor may claim a woodmen's lien against the timber or logs of the owner. We recognize that a rule that restricts the lien to goods owned by the debtor would deprive a sub-contractor of a lien. We are reluctant to propose a change which would substantially undercut the effectiveness of the lien. However, we think that the present law is deficient in that it provides no practical means by which the owner can discover the existence of such claims.

The Builder's Lien Act addresses similar issues in connection with the construction of buildings. We think that this kind of solution is simply too complex to be applied to forestry workers' liens. The British Columbia Law Reform Commission has been working towards a simpler solution.[259] Under this type of scheme, a sub-contractor could claim a lien against forest products of the owner. However, the lien would only secure the amount owed by the owner to the contractor. The sub-contractor may notify the owner of the claim. Upon doing so, the owner is liable for any subsequent payment made to the contractor. Under this scheme, the owner could to pay a contractor until notified of the existence of a lien. We think that this creates a fair balance between the interests of the lien claimant and the interests of the owner.

RECOMMENDATION 7 — GOODS BELONGING TO THIRD PARTY

A lien should attach only to goods owned by the debtor or goods in respect of which the owner has authorized the debtor to obtain the services giving rise to the lien. A secured party should not be considered an owner for

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[259] Unpublished paper on a Forest Work Security Act (1992).

the purposes of this provision. A forestry worker's lien should not be subject to this restriction. However, a forestry worker's lien should only secure the amount owing by the owner to a contractor after the owner has been notified of the lien. The owner should be liable for any amounts paid to the contractor following notification.

F. Enforceability of Lien

Under the present law, a lien claimant must generally keep physical possession of the goods to maintain the lien. There are several exceptions to this rule. A lien claimant does not lose possession if the lien claimant redelivers the goods to the debtor for a limited purpose under a bailment agreement. A non-possessory lien is available under the Garagemen's Lien Act provided that the lien claimant gets a written acknowledgment of indebtedness from the debtor and registers the lien. Non-possessory liens under the Thresher's Lien Act and the Woodmen's Lien Act require neither possession nor a written acknowledgment of indebtedness.

We think that no writing requirement should be necessary if the lien claimant has possession of the goods. The fact of possession is sufficient evidence of a claim to a lien. A lien claimant should not be considered to have possession if the goods are in the apparent or visible possession of the debtor.[300] Some tangible evidence of the provision of services should be available when a lien claimant surrenders possession of goods to the debtor. This can be supplied through a written acknowledgment of indebtedness signed by the debtor. An exception should be made for forestry workers' liens and a threshers' liens. These lien claimants do not have possession of the property in the first instance. They are not in a position to demand that a written acknowledgment of indebtedness be signed as a condition of releasing possession of the debtor. Therefore, a woodworker's lien and thresher's lien should be exempt from the requirement of a written acknowledgment of indebtedness as a condition of enforceability.

There are three additional issues. The first is whether a failure to satisfy the requirement of a written acknowledgment of indebtedness should make the lien unenforceable only against third parties or whether it should also make the

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300 A similar approach is taken in section 10 of the PPSA in relation to the enforceability of security agreements.

lien unenforceable against the debtor. A comparable provision in the PPSA provides that a failure to obtain a security agreement signed by the debtor only renders the security agreement unenforceable against third parties. A major function of the writing requirement is to provide third parties with some evidence that the claimant is in fact entitled to an interest in the property. However, with liens there is an additional function which the writing requirement may fulfil. A claim to a lien is associated with skill and labour or other services. There is a greater likelihood that disputes between the lien claimant and the debtor may arise about what services were actually rendered and the amount agreed to be paid. For this reason we think a failure to meet the requirement should make the lien unenforceable against the debtor as well as third parties. We think that a debtor who signs an acknowledgment of indebtedness should not be prevented from disputing the amount of the lien. The function of the acknowledgment is to establish the amount that the lien claimant claims to be due. We do not think that it should be used to show that the debtor accepts this as the correct amount. There is too great a risk that debtors who require immediate use of the goods may be coerced into signing the acknowledgment to obtain its release.

The second issue is whether a subsequent re-acquisition of possession by the lien claimant should satisfy the enforceability requirements. For example, suppose that a repairer fixes a motor vehicle and releases it to the debtor. The lien claimant does not get a written acknowledgment of indebtedness from the debtor. Several days later the debtor returns the vehicle to the repairer for additional work. Should the re-acquisition of possession by the lien claimant satisfy the enforceability requirements in relation to charges for the first set of repairs? The argument against re-acquisition of possession as a means of satisfying the enforceability requirement is that it reduces the usefulness of the signed acknowledgment of indebtedness as evidence of the amount of work claimed to be done and the amount claimed to be owing. The argument in favour of this position is that it recognizes that there may be an ongoing relationship between the lien claimant and the debtor in which the goods often are redelivered to the lien claimant several times. The classic case concerns a stable keeper. The owner may frequently take possession of the animal and later return it to the stable keeper. It is impractical to require a lien claimant to get a signed acknowledgment of indebtedness in this situation. We therefore think that a lawful re-acquisition of possession by a lien claimant should satisfy the enforceability requirement.

The third issue is whether the statute should require a lien claimant to get a written acknowledgment of indebtedness before releasing the goods to the debtor or whether it is sufficient if the lien claimant get it at some later date. An earlier version of the Garagemen's Lien Act required that a lien claimant get an acknowledgment of indebtedness before releasing possession. However, under the present statute the lien claimant may satisfy the requirement at some later date.[301] On balance, we think that it should be possible to satisfy the requirement after release of possession. A failure to get the acknowledgment before possession is surrendered places the lien claimant at risk. The lien claimant has lost the leverage of demanding the acknowledgment of indebtedness as a condition of release. Most lien claimants will refuse to take this risk. However, there may be cases where through inadvertence the acknowledgment is not taken or the person signing it does have the authority to bind the debtor. In such cases, the failure to get the acknowledgment should not result in the loss of the lien. A third party may acquire an interest in the goods after the lien claimant releases possession but before the lien claimant gets a signed acknowledgment of indebtedness. We think that the lien in this situation should be unenforceable against the third party, even if the lien claimant later gets a signed acknowledgment of indebtedness from the debtor.

RECOMMENDATION 8 — ENFORCEABILITY

A lien should be enforceable against the debtor or third parties only if the goods are in the possession of the lien claimant or the debtor has signed an acknowledgment of the indebtedness. A lien claimant should be deemed not to have taken possession of goods that are not in the apparent possession or control of the debtor or the debtor's agent. If a lien claimant has not complied with the enforceability requirements at the time a third party acquires an interest in the goods, subsequent compliance by the lien claimant should not render the lien enforceable against the third party. The signing of the acknowledgment should be without prejudice to the right of the debtor or other person to dispute the amount. The requirement for enforceability should not apply to a thresher's lien or a woodworker's lien.

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[301] *Union Tractor Ltd.* v. *FMX Construction Ltd.*, *supra*, note 50.

G. Attachment of Lien

At common law, there was some uncertainty about the precise point in time when a lien arises. In the usual case, the lien did not arise until the lien claimant completed the work. However, if the owner prevented completion of the work, the lien arose for the work actually done.[302] We think there may be cases in which it is unreasonable to require that a claimant complete the work, and that the lien should arise on the commencement of the services. The lien only secures the amount owing to a lien claimant. Therefore the lien might secure only a reduced amount or might be lost completely if the lien claimant is in breach of contract.

RECOMMENDATION 9 — ATTACHMENT OF LIEN

A lien should attach to the goods on the commencement of the services giving rise to the lien.

H. Care of Goods in Possession of Lien Claimant

The proposed statute should set out the duty of a lien claimant to care for the goods. The duty to take proper care of the property would arise when the lien claimant has a possessory lien. It would also arise when the lien claimant has caused the seizure of the property pursuant to a non-possessory lien. We think that the rights and duties of a lien claimant who has possession of goods should be substantially the same as those owed to a debtor by a secured party who is in possession of collateral. We therefore recommend that the proposed statute contain a provision substantially similar to section 17 of the PPSA.

RECOMMENDATION 10 — CARE OF GOODS IN POSSESSION OF LIEN CLAIMANT

A lien claimant or a sheriff who has possession of goods subject to a lien shall be under a duty to use reasonable care in the custody and preservation of the goods unless a higher standard is imposed by some other law. Unless

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302 *Halsbury's Laws of England*, 4th ed., vol. 28, (London: Butterworth's, 1979) at 239.

the parties otherwise agree, the parties should be subject to the following implied terms:

(a) reasonable expenses in obtaining, maintaining and preserving the goods are chargeable to the debtor and secured by the lien;

(b) the risk of loss to the extent of any deficiency in any insurance coverage is on the debtor; and

(c) the lien claimant or sheriff shall keep the goods identifiable, except that fungible goods may be co-mingled.

A lien claimant should be permitted to use the goods in accordance with any agreement with the owner, for the purpose of preserving the goods or pursuant to an order of a Court.

I. Request for Information

The existence of a lien against the debtor's goods may affect other third parties who have an interest in the same goods. These third parties have a legitimate right to information about the lien. They should have the right to a copy of an acknowledgment of indebtedness if the lien claimant has one. They should also have the right to a statement setting out the amount of the indebtedness and identifying the goods subject to the lien. Section 18 of the PPSA provides a mechanism through which an interested person can obtain this information. The person may demand certain information from a secured party. The secured party is legally obligated to provide this information, and remedies are available if the secured party fails to disclose it. The demand for information procedure was adopted in the Garagemen's Lien Act to provide a means of obtaining information from lien claimants.[380] We recommend that a similar demand for information procedure be included in the proposed statute.

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[380] The amendments coincided with the coming into force of the PPSA on October 1, 1990.

RECOMMENDATION 11 — REQUEST FOR INFORMATION

The debtor, a creditor, a sheriff or a third party who has an interest in the property should have the right to demand the following information from a lien claimant:

(a) a copy of any acknowledgment of indebtedness;

(b) a statement in writing of the amount of the indebtedness;

(c) a written approval or correction of an itemized list of goods attached to the demand indicating which goods are subject to the lien.

The person making the demand should have the right to obtain a court order requiring disclosure if the lien claimant fails to respond. The court should have the power to order that lien be extinguished or a registration discharged if the lien claimant does not comply with the demand. The Court should also have the power to exempt a lien claimant from compliance and to extend the time for compliance.

J. Assignment of Lien

Under the present law, a lien is a personal right which cannot be assigned.[304] This may present a difficulty where a lien claimant sells the business. The sale of the business will not give the new owner the right to claim the lien against the debtor, since the right to the lien can only be claimed by the old owner. As a result, the lien is lost as soon as the old owner surrenders possession of the goods to the new owner. There is no good commercial reason for keeping this rule. We therefore recommend that the proposed statute reverse the rule by providing that a lien claimant may assign a lien by an instrument in writing.

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[304] *Senft* v. *Bank of Montreal* (1986), 69 A.R. 35 (Q.B.). In the case of a statutory lien, the position is less clear. In most cases, the statute is silent and it likely that the common rule applies. Section 31 of the Woodmen's Lien Act provides for the assignment of the lien.

RECOMMENDATION 12 — ASSIGNMENT OF LIEN

A lien should be capable of assignment by an instrument in writing.

K. Termination of Lien

At common law, there were several methods by which a right to claim a lien could be lost. The most common was through loss of possession of the goods. A lien could also be lost if the lien claimant gave the debtor a period of credit within which to pay since the lien was only available where the debt was due. In addition, a lien could be lost through waiver. This might occur if the lien claimant took alternative security, although there was considerable uncertainty concerning the precise circumstances in which this would occur.

We think that the granting of a period of credit should not in and of itself result in a loss of a lien. This rule may have made sense in relation to possessory liens because loss of possession invariably led to loss of the lien. The rule does not make sense in respect of a system in which non-possessory liens are recognized. The release of possession by the lien claimant is typically based upon an express or implied understanding that the debtor should have a credit period within which to pay. We also think that the taking of a security interest in goods subject to a lien should operate as a waiver where the debt secured includes the amount of the lien.

RECOMMENDATION 13 — TERMINATION OF LIEN

A lien should not be lost by reason only that the lien claimant has allowed a period of credit for the payment of the debt. If a lien claimant takes a security interest in goods subject to a lien in order to secure an obligation which includes the amount of the lien, the lien claimant should be deemed to have taken the security interest in substitution of the lien.

CHAPTER 6 — PERFECTION AND PRIORITY OF THE LIEN

A. Introduction

The purpose of this chapter is to set out recommendations on perfectio of the lien. This topic deals with the steps that are necessary to protect the lie against third parties. The chapter will also make recommendations about th priority of the lien. This topic deals with the ranking of the lien claimant's clai as against competing third parties.

B. Perfection of Lien

Most private liens are possessory in nature. The only means by which th lien claimant may can maintain the lien is through continued possession of th goods. This requirement of possession had two functions. First, it provided som evidence of the contract giving rise to the lien in the event of a dispute about th right to claim a lien. Second, it provided third parties with the means determining the existence of the lien.

The three non-possessory liens created by statute adopted a much differe approach. The Threshers' Lien Act and the Woodmen's Lien Act do not requi registration. In its place, the Thresher's Lien Act provides a 60 day period withi which the lien claimant must enforce the lien. The Woodmen's Lien Act provid that a statement of claim must be filed within a certain period. Both of thes methods are poor substitutes for an effective registration system. We recommen that the thresher's lien and the woodworker's lien be subject to the registratio requirement.

The Garagemen's Lien Act provides for a lien on a motor vehicle or far vehicle. The lien claimant must get a written acknowledgment of indebtedne from the debtor and register the lien not later than 21 days after release possession. The failure to register within this 21 day period results in loss of th lien. We think that registration should not be needed to maintain the validi of the lien as between the debtor and the lien claimant. Registration provides method by which third parties can discover the lien. The failure to regist should result in subordination of the lien to third parties. However, there is n reason why a failure to register should invalidate the lien as between the lie claimant and the debtor. The written acknowledgment of indebtedness signed b the debtor provides evidence of the of the existence of the lien. Registration do

not provide any supporting evidence since it can be accomplished through a unilateral act of the lien claimant. At one time, the lien claimant registered the acknowledgment of indebtedness in the vehicle registry. In this context, a rule that tied validity of the lien to registration made sense. However, this was changed upon the introduction of the notice filing system on October 1, 1990. The acknowledgment of indebtedness no longer needs to be registered. As a result, there is no longer any reason why the lack of registration should invalidate the lien as between the debtor and the lien claimant.

We draw a distinction between the validity or enforceability of the lien and the notification steps that are needed to protect it against third parties. In this respect, the proposed statute borrows the concept of "perfection" used in the PPSA. Perfection denotes a step required to protect the secured party against subordination to third parties. The two major perfection steps are perfection by possession of the collateral and perfection by registration. Possession or registration provides a method by which third parties may discover the interest claimed by the creditor. In order to fulfil this function of providing notice, it is crucial that the lien claimant's possession be visible and apparent. Therefore, we think that a lien claimant should not be considered to have possession of goods if they are in the actual or apparent possession of the debtor.

RECOMMENDATION 14 — PERFECTION OF LIEN

A lien should be capable of being perfected by possession or by registration. A lien claimant should be deemed not to have possession of goods in the actual or apparent possession of the debtor or the debtor's agent.

C. Temporary Perfection

Under the proposed system, a lien claimant may perfect a lien by possession or by registration. The lien claimant has the option of changing the manner of perfection. A lien claimant who has possession of goods may take a signed acknowledgment of indebtedness and release the goods to the debtor. The lien claimant would also perfect the lien by registration in order to protect it against competing claims of third parties. At some later date, the lien claimant may again get possession of the goods. In this event, perfection by registration would no longer be required. A subsequent lapse of the registration would not prejudice the lien claimant, because the lien is perfected by possession.

There may be a gap between the time that a lien claimant releases possession of the goods to the debtor and the time of registration. The Garagemen's Lien Act provides a somewhat analogous system under existing law. Under that Act, a lien claimant has 21 days within which to register after releasing possession of the vehicle to the debtor. If a subsequent interest arises when the lien was unregistered, it will have priority over the lien.

We recommend a roughly equivalent approach. However, instead of using the Garagemen's Lien Act as a model, the proposed statute should adopt terminology and time periods consistent with those found in the PPSA. The temporary perfection periods in the PPSA are typically 15 days. We recommend that a similar period be adopted. The PPSA provides that a temporary perfection period is not effective against buyers and lessees without knowledge. We also recommend that the statute contain a similar formulation. Unlike the Garagemen's Lien Act, a failure to register within this period would not result in a loss of the lien. However, a failure to register within this period may result in subordination of the lien to third parties.

RECOMMENDATION 15 — TEMPORARY PERFECTION

A lien should be temporarily perfected for 15 days after the lien claimant delivers possession of the goods to the debtor. Temporary perfection should not be effective against a buyer or lessee who gives value for the interest without knowledge of the lien.

D. Effect of Non-Perfection

Under the present law, the loss of possession of a possessory lien or the failure to register a garagemen's lien within 21 days results in the loss of the lien. We have recommended that loss of possession or failure to register a lien should not invalidate the lien as between the debtor and the lien claimant. However, we think that it should result in the subordination of the lien to third parties who may have been prejudiced by the lack of perfection. We must now identify precisely which interests should get priority over an unperfected lien. We think that the priority position of an unperfected lien should be no different from the priority position of an unperfected security interest. In both cases, the same categories of third parties may be similarly prejudiced by the lack of registration. Section 20 of the PPSA sets out the categories of third parties who get priority

over an unperfected security interest. These include unsecured creditors who cause the personal property to be seized under judgment enforcement measures, the trustee in bankruptcy, and transferees who do not know of the existence of the security interest. We think that a similar formulation should be adopted in respect of an unperfected lien.

RECOMMENDATION 16 — EFFECT OF NON-PERFECTION

An unperfected lien should be subordinate to a person who causes the collateral to be seized under legal process, a trustee in bankruptcy or liquidator and a buyer or other transferee who acquires the interest for value and without knowledge of the lien.

E. Priority Against Buyers

We have recommended a major expansion of the registration option. One of the consequences of this recommendation is that there is a greater chance that a debtor who has possession of goods will sell or lease them to a third party. Registration of the lien is needed to give it priority over transferees who do not have knowledge of the lien. However, there are two instances where a buyer or lessee should have priority over a lien claimant even though the lien was perfected at the time of the sale or lease. The first involves an ordinary course sale or lease of goods and the second involves a sale or lease of consumer goods having a value of less than $1,000. In both cases, we recommend that the buyer or lessee should take priority over the lien claimant. Similar rules are provided in section 30 of the PPSA that favour buyers and lessees over secured parties.

We think that a buyer or lessee who acquires an interest in the goods in the ordinary course of business of the debtor should have priority over a lien claimant. The operation of this rule is illustrated in the following example. Suppose that a retail business engages in the selling of pre-fabricated swimming pools to its customers. Some of these swimming pools are damaged in transit and are sent to a repairer to be fixed. The repairer releases possession of the goods and perfects the lien by registration. It is unreasonable to require that ordinary course buyers search the registry before buying goods from a retail seller in this situation. The situation will generally arise where the lien claimant has a non-possessory lien against goods held by the debtor as inventory. We think it

appropriate that the lien claimant bear the risk of loss if such goods are released to the buyer.

We think that a buyer or lessee of consumer goods[305] of a value of $1000 or less should have priority over a perfected lien. This would cover situations where an individual sells consumer goods through a private sale (such as a garage sale or by advertising for buyers through a newspaper). Again, it is unrealistic to expect that these buyers would search the Registry before concluding the sale. We do not think that an expansion in the rights of lien claimants should be gained at the expense of innocent buyers.

RECOMMENDATION 17 — PRIORITY AGAINST BUYERS

A buyer or lessee of goods from a seller who sells it in the ordinary course of business should take free of any lien. A buyer or lessee of consumer goods of a value that does not exceed $1000 should take free of a lien if the buyer or lessee gave value and was without knowledge of the lien.

F. Priority Against Secured Creditors

A priority competition often arises between a lien claimant and a secured party who has a security interest in the goods. The PPSA provides a priority rule that resolves such disputes. Section 32 of the PPSA provides as follows:

> Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has with respect to the materials or services has priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have priority.

Section 32 gives the lien claimant priority in most cases. A lien claimant generally provides services that preserve or enhance the value of the goods. The priority

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[305] Consumer goods are defined in section 1(1)(j) of the PPSA to mean "goods that are acquired for use primarily for personal, family or household purposes".

is justified on the ground that a prior secured creditor should not gain a windfall at the expense of the lien claimant.[306] We agree with this basic premise and recommend that this approach be maintained.

Under the system that we propose, the lien of an innkeeper would be the only class of lien that would not fall within the scope of section 32. An innkeeper does not usually provide any services in relation to the goods subject to the lien and therefore could not take the benefit of section 32. The proposed statute would replace the common law which formerly governed possessory liens. As a result, the peculiar common law rule which gave an innkeeper a lien against goods belonging to a third party would no longer apply. The innkeeper's lien would therefore be subordinate to a prior security interest.

We also think that a failure to perfect a lien should result in loss of priority against secured creditors who have perfected security interests in the goods. The Ontario Repair and Storage Liens Act takes a different approach. It subordinates an unregistered lien only against third parties who acquire their interests after the lien arises.[307] This approach invites uncertainty. It is unclear if prior secured creditors who make future advances are protected. We think that a better approach is adopt a priority rule roughly equivalent to creditors who take purchase-money security interests in the collateral.[308] These creditors have a 15 day period within which to register after the debtor gets possession of the goods. If the creditor registers within this period, the creditor will have priority over prior perfected security interests. If the creditor fails to register within this period, the creditor will rank after the prior secured claim. Therefore, we think that a lien should be subordinate to a security interest that is perfected when the lien has attached to the goods but has not been perfected. For example, a lien claimant who has released possession of the goods but has failed to register within 15 days would be subordinate to a prior secured party who has a perfected security interest in the debtor's property. A lien claimant would therefore have to ensure that its lien was continuously perfected. An unperfected lien would also be subordinate to any subsequent security interest that is perfected before the lien is registered.

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306 G. Gilmore, *Security Interests in Personal Property*, vol. 2 (Boston: Little, Brown and Co., 1965) at 878.

307 Ontario Repair and Storage Liens Act, s.10(1).

308 PPSA, s.34.

RECOMMENDATION 18 — PRIORITY AGAINST SECURED CREDITORS

A lien should be subordinate to a security interest that is perfected during a time when the lien is attached but unperfected.

G. Priority Among Lien Claimants

A priority competition between two lien claimants does not usually arise in relation to possessory liens. The lien claimant loses the lien if the goods are released to the debtor. As a consequence, only one lien claimant will typically be in existence. Once recognition is given to non-possessory liens, the potential for disputes between two or more lien claimants increases. As a result, there is a greater need for a priority rule governing such disputes.

The Garagemen's Lien Act resolves a dispute between two garagemen's lien claimants in favour of the first to register.[309] We recommend a different approach. Priority should be determined in reverse chronological order to the order in which the liens were created. A more recent lien therefore takes priority over an earlier lien). This approach was adopted in the Ontario Repair and Storage Lien Act.[310] It is justified on two grounds. First, it permits a lien claimant to provide services without having to conduct a search of the Registry. A lien claimant has priority over prior perfected security interests. The lien claimant therefore does not have to search the Registry or be concerned about prior registered security interests. The overall system would be made more commercially workable if this feature were extended to non-possessory liens as well. Second, the repairs or services usually result in the enhancement of preservation of value of the goods. In this respect prior lien claimant may benefit from the work in the same way as prior secured parties. The proposed statute governs several different types of liens. It might be argued that priority as between competing claimants should depend upon the kind of lien involved. For example, a lien for repairs might be given priority over a lien for storage. We do not recommend a system for the ranking of lien claims. We think that it would significantly increase the complexity of the proposed legislation.

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[309] Section 6(1).

[310] Section 16. And see A. Close, *supra*, note 295 at 368-71.

The reverse order rule would only apply if the lien was continuously perfected. For example, if a subsequent lien claimant released possession to the debtor but did not register within the 15 day temporary perfection period, priority would be determined by the order of perfection. The lien would therefore be subordinate to a prior registered lien claimant. An unperfected lien should be subordinate to a perfected lien. If both liens are unperfected, priority should be determined by the order of attachment.

RECOMMENDATION 19 — PRIORITY AMONG LIEN CLAIMANTS

Priority among perfected lien claimants should be determined in reverse order to the order in which the liens were created. If the lien is not continuously perfected, priority should be based on the order of perfection. A perfected lien should have priority over an unperfected lien. Priority between two unperfected liens should be determined by the order of attachment of the liens.

CHAPTER 7 — REGISTRATION OF THE LIEN

A. Introduction

The purpose of this chapter is to set out recommendations on the technical aspects of registration. The discussion will consider the place of registration, the contents of a registration and the life of a registration. It will also consider renewal of a registration, the effect of errors in a registration and the amendment or discharge of a registration. The recommendations are designed to provide registration procedures that are compatible with the computerized registry system at the Personal Property Registry.

B. Method of Registration

The Garagemen's Lien Act is the only statute which provides a system for registration of a lien under existing law. A special form of financing statement (called a "Garageman's Lien Financing Statement") is used to register the lien. The registering party must indicate the date when the vehicle was released. The computerized registry system will not accept a registration after the 21 day period has elapsed. The Garagemen's Lien Financing Statement must also disclose the amount of the lien, the name and address of the lien claimant, the name and address of the debtor and the serial number of the vehicle. The registration is effective for 6 months and thereafter lapses unless it is renewed. A lien claimant must get a court order to renew or amend a registration. A "Garageman's Lien Financing Change Statement" is used to record the renewal or amendment. It may also be used to discharge a registration.

We think that the Personal Property Registry is the appropriate registry for registration of liens. However, we think that there several changes should be made to the present system. We do not see the need for separate forms for the registration of liens. Security interests, writs of execution, matrimonial property orders and other registerable interests are registered by financing statement. There is no reason why the same form should not be used to register liens. A separate form is used under the present system because of the peculiar registration rules of the Garagemen's Lien Act. The Act requires registration within 21 days after the debtor gets possession of the vehicle. It also requires that the amount of the indebtedness be recorded. This information is not needed under the new system which we propose. An interested person would have the

right to get more detailed information about the lien from the lien claimant.[311] The new system would not prohibit registration of a lien after the 15 day grace period for registration expires. However, a failure to effect a timely registration could result in a loss of priority to third parties.[312] As a result, there is no longer any need for a special form of financing statement.

We recommend that the registration have a life of one year and that it be renewable for further periods of one year. Renewal would be accomplished by registration of a financing change statement. We think that the variable registration capability (which permits the registering party to choose a registration life of between 1 and 25 years or infinity) should not be available to a lien claimant. In the case of a lien, there already has been a failure to pay and therefore there is no need to provide for lengthy periods of registration. If the one year period is not sufficient, the registration may be renewed.

RECOMMENDATION 20 — REGISTRATION OF LIEN

Registration of a lien should be accomplished by registration of a financing statement at the Personal Property Registry. The registration should have a life of one year and it should be renewable for further periods of one year.

C. Contents of Registration

As a basic principle, the information required in a financing statement in respect of a lien should be similar to the information required in respect of a security interest. Therefore we recommend that the registration of a lien provide the name and address of the debtor, the name and address of the lien claimant and a description of the goods subject to the lien. However, we recognize that some of the collateral description features of the PPSA are designed to facilitate inventory financing and should not be extended to registration of liens. We do not think that a lien claimant should be permitted to describe the subject matter of the lien as "all present and after-acquired personal property". It is not possible under law to have an all encompassing lien, and therefore this description is inappropriate. Similarly, a lien claimant should not be permitted to use a

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311 See Recommendation 11.

312 See Recommendation 16.

"proceeds" description. The proposed statute does give a lien claimant a right to claim proceeds as does the PPSA.

We think that a registering party should describe the goods by item or kind. The Personal Property Registry Regulations provide a category called "serial number goods". This definition does not cover all goods that have a serial number. It only covers motor vehicles, boats, aircraft and certain other items.[313] Under the PPSA, serial number registration is optional where the collateral is serial number goods held as inventory or equipment. We do not propose to extend this option to liens since it is reasonable to expect that the lien claimant provide more specific information in the registration.[314]

The information contained in a registration should be capable of being amended by registration of a financing change statement. The change would only operate from the time the amendment was registered. Therefore, there is no longer any concern over the effect of an amendment on the rights of third parties as there is under the present law. As a result, there is no reason why a court order should be required to make a change in the information contained in a registration.

RECOMMENDATION 21 — CONTENTS OF REGISTRATION

A financing statement relating to a lien should provide for the name and address of the debtor, the name and address of the lien claimant, and should require that the goods be described by item or by kind. Goods classified as "serial number goods" should be required to be registered by serial number. Information contained in a financing statement should be capable of being changed by registration of a financing change statement.

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313 Personal Property Security Regulation, s. 1(s).

314 A similar approach is taken by the Regulations in relation to registration of writs of execution. Registration by serial number of serial number goods is required except in the case of inventory. See Personal Property Security Regulation, s.21.

D. Duty to Provide Financing Statement

The personal property registry system does not require that a debtor sign a financing statement. As a result, a person may not be aware that a lien claimant has registered a lien against that person's name. The registration can make it difficult for the person named as debtor to sell the goods or obtain credit. This can cause problems if the lien claimant is not entitled to the lien or if the financing statement misdescribes the goods. The PPSA provides that a secured party must give a debtor a copy of the financing statement or verification statement not later than 20 days after the financing statement is registered.[315] The debtor may, however, waive the right to receive a copy of the financing statement.

We think that a similar duty should be placed upon a lien claimant. This will alert a person to fact that another person is claiming a lien in that person's goods. It will also give the debtor an opportunity to determine if the description of the goods is accurate. The person can then request that the lien claimant amend or discharge the registration if the lien claimant is not entitled to a lien on those goods. The receipt of a copy of the financing statement will also bring home the point to the debtor that the lien claimant is maintaining a lien and may enforce it if the amount is not paid. We think that the duty to provide a copy of the financing statement should not be capable of waiver.

RECOMMENDATION 22 — DUTY TO PROVIDE FINANCING STATEMENT

A lien claimant should be required to give a copy of a financing statement or verification statement to each person named as debtor.

E. Effect of Errors in Registration

One of the most frequently litigated issues is the effect of an error in a registration. The test of compliance which formerly governed registrations under the Garagemen's Lien Act was repealed upon the coming into force of the PPSA. In its place, the PPSA test of validity was extended to garagemen's liens. Section 42(1.1) of the PPSA provides that Part 4 of the PPSA (the Part dealing with

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315 PPSA, s.43(11).

registration) applies where any other enactment permits or requires a registration to be made in the Personal Property Registry. Section 43 of the PPSA sets out a detailed set of principles which govern this question. The foundational rule is that validity of a financing statement is not affected by a defect, irregularity omission or error in the financing statement or in the registration unless it is seriously misleading. This is an objective test. It does not require that a person is actually misled. It is sufficient if the registration had the potential to mislead. We recommend that the same test apply to registrations of liens. We think that it is important to maintain a policy of harmonization with the PPSA registry system. No special provision is needed in the proposed statute in order to incorporate section 43 of the PPSA. Section 42(1.1) of the PPSA already provides that the registration provisions of the PPSA will apply to the registration of liens.

RECOMMENDATION 23 — EFFECT OF ERRORS IN REGISTRATION

The validity of a registration should not be affected by an error unless it is seriously misleading. It should not be necessary to demonstrate that anyone was actually misled by the error.

F. Discharge of Registration

The registration system should provide a mechanism through which a debtor may require amendment of incorrect information in a registration. It should also provide a means through which an interested person may require a discharge of the registration if the lien claimant is not entitled to a lien. Section 50 of the PPSA provides such a system in relation to security interests. A similar system was added to the Garagemen's Lien Act[316] upon the coming into force of the PPSA. We recommend that a similar system also be available in relation to liens.

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316 Section 11.1.

RECOMMENDATION 24 — DISCHARGE OF LIEN

The debtor or any person with an interest in the goods should be able to give a written demand requiring the lien claimant to amend or discharge a registration if the indebtedness has been paid or if the lien claimant is not entitled to claim a lien on the described goods. The lien claimant should then be required to amend or discharge the registration or provide the Registrar with an order of the Court confirming the registration. If the lien claimant fails to comply with the demand, the debtor or other person should be entitled to register a financing change statement amending or discharging the registration.

CHAPTER 8 — ENFORCEMENT OF THE LIEN

A. Introduction

The purpose of this chapter is to set out recommendations on the rights, remedies and duties of a lien claimant who enforces a lien. There are two possible models for the enforcement remedies of a lien claimant. The first is the enforcement system available to secured creditors under the PPSA. The second is the reformed enforcement system for unsecured creditors proposed by the Alberta Law Reform Institute. This chapter will begin with the reasons why we think that the enforcement system available to secured creditors is the more appropriate model. The chapter will then make recommendations about the manner of seizure and sale of the goods and the distribution of the proceeds of sale. It will also make recommendations about retention of the goods in satisfaction of the debt, redemption of the goods and the power of the Court to intervene and supervise the enforcement process.

B. Choice of Models for the Enforcement System

There is an almost complete lack of consistency in the design of the enforcement remedies under the present law. Significant benefits can be gained from a single uniform system for the enforcement of liens. The enforcement system could be based upon the enforcement system available to secured creditors. A sheriff conducts the seizure if the secured party does not have possession of the collateral.[317] The sheriff then delivers the collateral to the secured creditor. The secured creditor conducts the sale. The collateral may be sold by public sale, including public auction. It may also be sold by closed tender or by private sale.[318] The secured creditor may only buy the collateral at a public sale, and only if the price bears a reasonable relationship to the market value.[319] Alternatively, the secured creditor may propose to retain the collateral in satisfaction of the debt.[320] If no one objects to this proposal, title to the collateral vests in the secured creditor and the debt is extinguished. The secured creditor is under a duty to act in good faith and in a commercially reasonable

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317 PPSA, s.58.

318 Section 60(2).

319 Section 60(11).

320 Section 62.

manner.[321] The court has a broad power to intervene and supervise the enforcement process.[322]

Alternatively, the enforcement system could be modelled after the reformed judgment enforcement system proposed by the Alberta Law Reform Institute.[323] Under this system, the sheriff conducts the seizure and the sale of the property and distributes the proceeds among the unsecured creditors. In the usual case, the sheriff leaves the goods with the debtor under a bailee's undertaking. The debtor has a 14 day period within which to object to the seizure. The sale may be through public sale or private sale. A unsecured creditor may buy the goods from the sheriff. However, if the creditor buys the goods at a private sale, the price must bear a reasonable relationship to the market value.[324]

We think that the enforcement system under the PPSA is the more appropriate model. There are several reasons why we take this view. Many of the features of the judgment enforcement system available to unsecured creditors were designed specifically to operate in a system where exemptions are available to the debtor and where creditors share the proceeds of sale. The notice of objection system is of primarily a means of resolving controversies about exemptions. The sale by the sheriff is necessary in part because the proceeds of sale must be shared and the sheriff is a logical candidate for identifying the claimants. This system is not appropriate for the enforcement of a lien. Exemptions from seizure are not available against lien claimants. The lien creates a preferential right to apply the proceeds of sale solely against the amount of the lien.

There are other reasons for preferring a system in which the lien claimant is responsible for the conduct of the sale. In many cases the sheriff does not conduct a seizure because the lien claimant already has possession of the goods under a possessory lien. The judgment enforcement system is inappropriate because it is premised on the assumption that the sheriff conducts the seizure in the first instance. The choice can also be supported on the basis of a comparison of the relative levels of commercial expertise of the parties. Under the judgment

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321 Section 66(1).

322 Section 64.

323 *Enforcement of Money Judgments*, Report No. 61 (Edmonton: ALRI, 1991).

324 *Ibid.*, at 70-111.

enforcement system, the unsecured creditors may have no particular expertise in conducting the sale. This expertise is provided by the sheriff. However, lien claimants generally have a higher level of expertise because they are in the business of dealing with such goods. Indeed, in most cases they are in a better position than the sheriff to locate buyers and assess the market value of the goods.

There is potential for abuse of the right to claim a lien. This occurs where a lien claimant asserts a lien in an attempt to coerce payment where there is a contractual dispute between the parties. For example, a lien claimant may threaten to enforce a lien against the debtor even though there is a legitimate dispute about the quality of the work. However, we think that this should be remedied by a dispute resolution provision specifically tailored to meet this problem.

C. Seizure of Goods Subject to a Non-Possessory Lien

Rules governing seizure of goods are unnecessary where possessory liens are involved because the lien claimant already has possession of the goods. However, the first step in the enforcement of a non-possessory lien involves the seizure of the goods. No consistent approach is taken under the present law. Seizures under a garageman's lien are conducted by a sheriff and governed by the provisions of the Seizures Act. A seizure under a thresher's lien may be conducted by the lien claimant. If peaceable seizure cannot be made, the lien claimant may enforce the lien by way of distress (in which case the sheriff would effect seizure). The Woodmen's Lien Act provides a procedure under which a sheriff may enforce the lien in the same manner as a seizure under a writ of execution or alternatively through an antiquated writ of attachment procedure.

We recommend a single, uniform system for seizure. We think that the sheriff, or a bailiff appointed by the sheriff, should be responsible for carrying out the actual seizure. There is no reason in principle why the same rules governing seizure of collateral under a security agreement should not also apply to a seizure of goods subject to a lien. We therefore recommend that the seizure of goods be governed by rules similar to those set out in the PPSA.

RECOMMENDATION 25 — SEIZURE OF GOODS SUBJECT TO A NON-POSSESSORY LIEN

A seizure of goods under a non-possessory lien should be effected by a sheriff or a person appointed by a sheriff. The procedure should be the substantially the same as the procedure for seizure of collateral under a security agreement.

D. Sale of Goods Subject to a Lien

There are two significant problems with the current sale procedure under the various lien statutes. The first involves the wide variation in notice and sale procedures found in the statutes. There is no sound policy reason for these differences. The statute we propose adopts a single realization procedure governing the sale of the goods. We think that the procedure should be substantially the same the procedure for the sale of collateral under the PPSA. The lien claimant must give the debtor a notice of intended sale at least 20 days in advance of the sale. The notice should must include a description of the collateral and the amount of indebtedness. It must also set out particulars on the manner of sale. The notice must be given to the debtor and also to other third parties who have an interest in the goods. These parties may be interested in the outcome of the sale because they may be entitled to any surplus that may result.

There is one variation to the PPSA sale procedure which we propose. We think that the debtor should have at least 30 days after the failure to pay within which to redeem the goods. This will increase the possibility of redemption by ensuring that employment or other income paid at monthly intervals will be available. The 20 day notice of intended sale could be given to the debtor within this period so long as the sale is conducted at least 30 days after the debt becomes due.

The second problem concerns the manner of sale. The statutes either require that the sale of goods be by public auction (under the Livery Stable Keepers Act, Innkeepers Act, Warehouseman's Lien Act and Garagemen's Lien Act) or require a Court order before sale (under the Possessory Liens Act). These requirements may result in lower prices and greater costs. Both the debtor and the lien claimant benefit by a sale mechanism which permits the higher recovery on realization. We think that a lien claimant should be permitted to dispose of

the goods through a private sale as an alternative to a public sale. The use of the private sale as an enforcement remedy is recognized in the PPSA. It has also been recommended by the Alberta Law Reform Institute in connection with the judgment enforcement measures of unsecured creditors. We think that the lien claimant should not be permitted to purchase the goods through a private sale. The lien creditor would be required to act in good faith and in a commercially reasonable manner in conducting the sale.[325]

RECOMMENDATION 26 — SALE OF GOODS SUBJECT TO LIEN

A lien claimant should have the right to sell the goods 30 days after the debt becomes due. The lien claimant should be required to give notice of the intended sale not less than 20 days prior to the disposition of the goods. The notice should contain a description of the collateral, the amount of indebtedness including any expenses for storage and disposition, and a statement that the goods may be redeemed, and should set out the particulars of the intended sale. The goods may be disposed of by private or public sale, but the lien claimant may not purchase the goods in the case of a private sale.

E. Costs of Realization

At common law, the lien claimant can not recover the costs of storage of the goods after default unless the parties have contracted to this effect. Some of the lien statutes provide for recovery of storage costs, but no consistent approach is taken. We think that reasonable storage costs should be recoverable in addition to other costs of realizing on the goods. Costs of storage are recoverable in respect of a security interest, and there is no reason why they should not be recoverable in respect of a lien.

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[325] See Recommendation 32.

RECOMMENDATION 27 — COSTS OF REALIZATION SECURED BY LIEN

The lien should secure reasonable costs of seizure and sale, including costs of storage after default in payment.

F. Surplus or Deficiency

The sale of goods under an enforcement sale may not produce enough money to satisfy the lien. The remaining unpaid debt is referred to as a deficiency. Alternatively, the sale may result in more money than is needed to satisfy the lien. The excess funds are referred to as a surplus. Under the present law, the enforcement of a lien through sale does not prevent the lien claimant from suing for a deficiency as an unsecured creditor. The Ontario Repair and Storage Liens Act changed the law in Ontario by barring a claim for a deficiency if the lien is enforced through sale.[326] The justification for this restriction was that "persons in the repair or storage business should decide that either the consumer is credit worthy or that the article may be sold to realize the value of the lien."[327] In Alberta, a somewhat analogous "seize or sue" system governs the enforcement remedies of sellers who take security interests in consumer goods.[328] However, a seller is in a position to fully secure the debt by structuring the down-payment and repayment schedule to cover the expected depreciation of the goods. The same considerations do not apply to a lien claimant. The right to claim a lien is not restricted to consumer goods, and the consumer protection rationale is therefore inappropriate. In addition, there may be legitimate reasons why the lien claim exceeds the value of the goods. For example, the deficiency may result from a drop in commodity prices of goods stored in a warehouse. We have therefore concluded that a lien claimant should not be prevented from seeking judgment for any deficiency.

If a surplus results out of the sale, the lien claimant should distribute the surplus in the same manner as provided in section 61 of the PPSA. Section 61 recognizes that other third parties may also have an interest in the property.

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326 Section 18.

327 *Discussion Paper on Repair and Storage Liens* (1985), Ministry of the Attorney General, at 41.

328 Law of Property Act, R.S.A. 1980, c. L-8, ss. 47, 49-50.

Turning the surplus over to the debtor may severely prejudice their position. Accordingly, a secured party must turn the surplus over to subordinate secured parties who have registered a financing statement. If there are none, then the surplus the secured party must pay it over to any other third party who has notified the secured party. If there are no other claimants, the secured party must pay the surplus to the debtor. This only establishes a procedural rule and does not determine the relative priority of the claims. If it seems likely that a dispute over priority will arise, the secured party may pay the surplus into Court. We think that a similar system should be provided in relation to a surplus that arises after a lien is enforced through sale.

RECOMMENDATION 28 — SURPLUS OR DEFICIENCY

A debtor should be liable to the lien claimant for any deficiency following sale. A surplus should distributed first to any subordinate secured parties or lien claimants who have perfected their interests, then to any other person who has notified the lien claimant, and then to the debtor or any other person known to be the owner. The lien claimant should be entitled to pay the surplus into Court where there is a question concerning entitlement to the money.

G. Retention of Goods in Satisfaction of Obligation

We think that a lien claimant should have the right to retain the goods in satisfaction of the debt. This remedy is an alternative to a sale of the goods. A lien claimant who exercise this remedy gets ownership of the goods, and the debt secured by the lien is extinguished. As a result, the lien claimant loses the right to sue for any deficiency. Some safeguards must be provided to ensure that a lien claimant does not obtain a surplus which would otherwise be available to a debtor or interested third party. This is accomplished by giving the debtor and third parties a notice of intention. If the debtor or a third party objects, the lien claimant must either sell the goods or get a court order invalidating the objection. If no one objects within 15 days after the notice is given, the lien claimant is considered to have made an irrevocable election to retain the goods in satisfaction of the lien. This proposed procedure is substantially the same as that provided in section 62 of the PPSA.

RECOMMENDATION 29 — RETENTION OF GOODS IN SATISFACTION OF OBLIGATION

A lien claimant should be have the right to propose to retain the goods in satisfaction of the obligation. The lien claimant should be required to give a notice of intention to the debtor and other interested parties. If the debtor or other interested party objects, the lien claimant should be required to conduct a sale or obtain an order of a Court dispensing with the objection.

H. Redemption of Goods

We think that a debtor should have the right to redeem the goods by satisfying the amount of the lien (including costs of seizure and storage). The right of redemption should also be available to a third party who has an interest in the goods. For example, a subordinate secured party may exercise the right of redemption to ensure there is no interference with the enforcement of its security interest. The right to redeem may be exercised at any time before the before the lien claimant contracts for the sale of the goods or before the lien claimant makes an irrevocable election to retain the goods.

RECOMMENDATION 30 — REDEMPTION OF GOODS

A debtor or other interested party should have the right to redeem the goods by satisfying the amount of the lien and any reasonable costs of storage and seizure.

I. Supervisory Power of the Court

Disputes may arise over the validity, enforcement or priority of a lien. We think that the Court of Queen's Bench should have a wide latitude to intervene. The Court should have the power to supervise the enforcement process by making orders or giving directions to protect the interests of the lien claimant, the debtor and interested third parties. In addition, the Court should have the power to resolve disputes over priority in a summary manner so long as the facts are not in dispute. The PPSA contains a similar system which provides a quicker and less costly method of resolving disputes.

RECOMMENDATION 31 — SUPERVISORY POWER OF COURT

The Court should be empowered to make orders to ensure compliance with the Act, to give directions, relieve compliance or stay enforcement, to determine questions of priority or to make any other order that is necessary to ensure protection of the interests of any person in the goods.

J. Good Faith and Commercial Reasonableness

We think that the rights, remedies and duties of the parties should be subject to a comprehensive standard of good faith and commercial reasonableness. The duty to act in good faith and in a commercially reasonable manner frequently arises in connection with enforcement procedures. A lien claimant may conduct a sale may have been conducted negligently or in bad faith (such as a sale to a friend or relative at an undervalue). A lien claimant is given a powerful right to proceed against the debtor's property to satisfy the amount of the lien. It is legitimate to impose a duty on the lien claimant to take reasonable steps to ensure that unnecessary loss is not caused by the exercise of the remedy. The duty of good faith and commercial reasonableness should not be limited to the lien claimant. It should apply equally to the debtor. A person who fails to meet this obligation should be liable to pay damages.

RECOMMENDATION 32 — GOOD FAITH AND COMMERCIAL REASONABLENESS

The parties should be under a duty to exercise or discharge all rights, duties or obligations in good faith and in a commercially reasonable manner. A person to whom an obligation or duty is owed should have a right to recover damages for loss that was reasonably foreseeable as liable to result from a failure to meet this standard.

K. Deemed Damages

A lien claimant who fails to comply with the proposed statute may be liable to pay damages for loss caused to another person. However, it may be

difficult in some cases for the person to prove any loss. There are two situations in which this is of particular concern. The first involves duties that are critical to safeguard the proper operation of the registry system. We include in this category the duty to provide a copy of the financing statement to the debtor and the duty to amend or discharge a financing statement when required by law. These duties prevent a person from abusing the system by maintaining a registration against goods when that person is not entitled to a lien. The second involves the enforcement of liens against consumer goods. The value of consumer goods are often low and consumer debtors are often not commercially sophisticated. A lien claimant may deliberately pursue a policy of non-compliance because there is little chance that the debtor will bring legal action. In order to provide an added incentive to comply, we propose that the debtor have a right to deemed damages against the lien claimant. The deemed damages would allow the debtor to recover a fixed amount from the lien claimant even in the absence of actual proof of loss. Any additional loss which the debtor could prove would also be recoverable. The deemed damages should be set at the same amount as deemed damages under the PPSA. This amount is prescribed by regulation under the PPSA, and is currently set at $200.

RECOMMENDATION 33 — DEEMED DAMAGES

A lien claimant who without reasonable excuse fails to comply with the duty to provide the debtor with a copy of the financing statement or the duty to amend or discharge a financing statement is liable to pay deemed damages to the person named as debtor. The right to claim deemed damages should also be available to a debtor where consumer goods are involved. The amount of the deemed damages should be the same as the amount of deemed damages prescribed under the PPSA.

L. Dispute Resolution

A lien claimant may abuse the right to claim a lien where there is a dispute about the quality of the work performed, whether the work was authorized or over some other matter. In such cases, a lien claimant may try to withhold possession of the goods as a method of getting payment in excess of the amount

that the lien claimant is justly entitled to recover. Rule 469 of the Rules of Court covers this kind of situation.[329] Rule 469 provides:

> Where any personal property is sought to be retained or attached by virtue only of a lien or otherwise as security for money, the court may, upon motion, order that the person otherwise entitled to possession of the property be given possession upon payment into court, to abide the event of action or proceedings commenced, of the amount of the lien or security claimed, plus such further sum, if any, for interest and costs as may be just.

We think that this approach could be improved by eliminating the requirement that the debtor get a Court order before paying the money into Court. When the money is paid into Court, the lien claimant must surrender the goods. The lien claimant would lose the lien, and in place of it would have a charge on the money paid into Court. The payment into Court could be accompanied by an offer of settlement. The lien claimant would be required to commence an action (or accept the offer of settlement) within 90 days.

RECOMMENDATION 34 — DISPUTE RESOLUTION

Where there is a dispute about the amount of the lien or the right of the lien claimant to take or retain possession of the goods, the owner should be entitled to pay into Court the full amount claimed by the lien claimant. Upon doing so, the owner should be entitled to a release of the goods if retained by the lien claimant and the lien is discharged. In its place, the lien claimant should have a charge on the money paid into Court. The owner should be permitted to include an offer of settlement in the application. The charge on the money paid into Court should be discharged if an offer of settlement is not accepted or the lien claimant does not commence action to recover the money within 90 days.

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[329] A somewhat similar dispute resolution mechanism is found in section 4 of the Innkeepers Act.

PART III — LIST OF RECOMMENDATIONS

RECOMMENDATION 1 — ONE STATUTE

Non-consensual liens in personal property should be governed by a single statute. The statute should set out a unified set of rules concerning the nature and extent of the lien, the priority of the lien against third parties and the procedure for its enforcement. The statute would replace the following legislation:

Garagemen's Lien Act
Innkeepers Act (ss 2-6)
Livery Stable Keepers Act
Possessory Liens Act
Threshers' Lien Act
Warehousemen's Lien Act
Woodmen's Lien Act

The same rules would apply to the various types of liens unless there is a good reason that justifies a difference in treatment.

RECOMMENDATION 2 — NON-APPLICATION OF PROPOSED STATUTE

The statute should not apply to Crown liens or other non-consensual security interests given to public or quasi-governmental bodies, to general liens, to the landlord's right of distress for unpaid rent or to an unpaid seller's lien governed by the Sale of Goods Act.

RECOMMENDATION 3 — TRANSITION

The proposed statute should apply to liens that were created before its coming into force. A non-possessory lien under the Garagemen's Lien Act should be considered registered until the registration expires. The proposed statute should provide that a garageman's lien may be re-registered in the Personal Property Registry before the registration expires.

RECOMMENDATION 4 — ABOLITION OF OBSOLETE LIENS

The Beet Lien Act should be repealed.

RECOMMENDATION 5 — ENTITLEMENT TO A LIEN

The following classes of lien claimants should be recognized:

(a) a person has a lien on goods in respect of which the person has expended labour or skill for the purpose of improving, restoring or maintaining its condition or properties;

(b) a storer has a lien on goods that have been stored;

(c) a common carrier has a lien on goods for carriage charges in respect of which a bill of lading is issued;

(d) an innkeeper, boarding house keeper or lodging house keeper has a lien on the goods brought on to the premises;

(e) a thresher has a lien on any grain that has been cut or threshed.

(f) a forest worker has a lien on logs or timber in respect of which labour or services are rendered and any logs or timber which have been mixed with logs or timber in respect of which the labour or services have been rendered.

RECOMMENDATION 6 — OBLIGATION SECURED BY LIEN

The claim secured by the lien should be restricted to the amount agreed to be paid for the services relating to the property against which the lien is claimed. If no amount has been agreed upon, the lien should secure the fair value of the services rendered.

RECOMMENDATION 7 — GOODS BELONGING TO THIRD PARTY

A lien should attach only to goods owned by the debtor or goods in respect of which the owner has authorized the debtor to obtain the services giving rise to the lien. A secured party should not be considered an owner for the purposes of this provision. A forestry worker's lien should not be subject to this restriction. However, a forestry worker's lien should only secure the amount owing by the owner to a contractor after the owner has been notified of the lien. The owner should be liable for any amounts paid to the contractor following notification.

RECOMMENDATION 8 — ENFORCEABILITY

A lien should be enforceable against the debtor or third parties only if the goods are in the possession of the lien claimant or the debtor has signed an acknowledgment of the indebtedness. A lien claimant should be deemed not to have taken possession of goods that are not in the apparent possession or control of the debtor or the debtor's agent. If a lien claimant has not complied with the enforceability requirements at the time a third party acquires an interest in the goods, subsequent compliance by the lien claimant should not render the lien enforceable against the third party. The signing of the acknowledgment should be without prejudice to the right of the debtor or other person to dispute the amount. The requirement for enforceability should not apply to a thresher's lien or a woodworker's lien.

RECOMMENDATION 9 — ATTACHMENT OF LIEN

A lien should attach to the goods on the commencement of the services giving rise to the lien.

RECOMMENDATION 10 — CARE OF GOODS IN POSSESSION OF LIEN CLAIMANT

A lien claimant or a sheriff who has possession of goods subject to a lien shall be under a duty to use reasonable care in the custody and preservation of the goods unless a higher standard is imposed by some other law. Unless the parties otherwise agree, the parties should be subject to the following implied terms:

(a) reasonable expenses in obtaining, maintaining and preserving the goods are chargeable to the debtor and secured by the lien;

(b) the risk of loss to the extent of any deficiency in any insurance coverage is on the debtor; and

(c) the lien claimant or sheriff shall keep the goods identifiable, except that fungible goods may be co-mingled.

A lien claimant should be permitted to use the goods in accordance with any agreement with the owner, for the purpose of preserving the goods or pursuant to an order of a Court.

RECOMMENDATION 11 — REQUEST FOR INFORMATION

The debtor, a creditor, a sheriff or a third party who has an interest in the property should have the right to demand the following information from a lien claimant:

(a) a copy of any acknowledgment of indebtedness;

(b) a statement in writing of the amount of the indebtedness;

(c) a written approval or correction of an itemized list of goods attached to the demand indicating which goods are subject to the lien.

The person making the demand should have the right to obtain a court order requiring disclosure if the lien claimant fails to respond. The court should have the power to order that lien be extinguished or a registration discharged if the lien claimant does not comply with the demand. The Court should also have the power to exempt a lien claimant from compliance and to extend the time for compliance.

RECOMMENDATION 12 — ASSIGNMENT OF LIEN

A lien should be capable of assignment by an instrument in writing.

RECOMMENDATION 13 — TERMINATION OF LIEN

A lien should not be lost by reason only that the lien claimant has allowed a period of credit for the payment of the debt. If a lien claimant takes a security interest in goods subject to a lien in order to secure an obligation which includes the amount of the lien, the lien claimant should be deemed to have taken the security interest in substitution of the lien.

RECOMMENDATION 14 — PERFECTION OF LIEN

A lien should be capable of being perfected by possession or by registration. A lien claimant should be deemed not to have possession of goods in the actual or apparent possession of the debtor or the debtor's agent.

RECOMMENDATION 15 — TEMPORARY PERFECTION

A lien should be temporarily perfected for 15 days after the lien claimant delivers possession of the goods to the debtor. Temporary perfection should not be effective against a buyer or lessee who gives value for the interest without knowledge of the lien.

RECOMMENDATION 16 — EFFECT OF NON-PERFECTION

An unperfected lien should be subordinate to a person who causes the collateral to be seized under legal process, a trustee in bankruptcy or liquidator and a buyer or other transferee who acquires the interest for value and without knowledge of the lien.

RECOMMENDATION 17 — PRIORITY AGAINST BUYERS

A buyer or lessee of goods from a seller who sells it in the ordinary course of business should take free of any lien. A buyer or lessee of consumer goods of a value that does not exceed $1000 should take free of a lien if the buyer or lessee gave value and was without knowledge of the lien.

RECOMMENDATION 18 — PRIORITY AGAINST SECURED CREDITORS

A lien should be subordinate to a security interest that is perfected during a time when the lien is attached but unperfected.

RECOMMENDATION 19 — PRIORITY AMONG LIEN CLAIMANTS

Priority among perfected lien claimants should be determined in reverse order to the order in which the liens were created. If the lien is not continuously perfected, priority should be based on the order of perfection. A perfected lien should have priority over an unperfected lien. Priority between two unperfected liens should be determined by the order of attachment of the liens.

RECOMMENDATION 20 — REGISTRATION OF LIEN

Registration of a lien should be accomplished by registration of a financing statement at the Personal Property Registry. The registration should have a life of one year and it should be renewable for further periods of one year.

RECOMMENDATION 21 — CONTENTS OF REGISTRATION

A financing statement relating to a lien should provide for the name and address of the debtor, the name and address of the lien claimant, and should require that the goods be described by item or by kind. Goods classified as "serial number goods" should be required to be registered by serial number. Information contained in a financing statement should be capable of being changed by registration of a financing change statement.

RECOMMENDATION 22 — DUTY TO PROVIDE FINANCING STATEMENT

A lien claimant should be required to give a copy of a financing statement or verification statement to each person named as debtor.

RECOMMENDATION 23 — EFFECT OF ERRORS IN REGISTRATION

The validity of a registration should not be affected by an error unless it is seriously misleading. It should not be necessary to demonstrate that anyone was actually misled by the error.

RECOMMENDATION 24 — DISCHARGE OF LIEN

The debtor or any person with an interest in the goods should be able to give a written demand requiring the lien claimant to amend or discharge a registration if the indebtedness has been paid or if the lien claimant is not entitled to claim a lien on the described goods. The lien claimant should then be required to amend or discharge the registration or provide the Registrar with an order of the Court confirming the registration. If the lien claimant fails to comply with the demand, the debtor or other person should be entitled to register a financing change statement amending or discharging the registration.

RECOMMENDATION 25 — SEIZURE OF GOODS SUBJECT TO A NON-POSSESSORY LIEN

A seizure of goods under a non-possessory lien should be effected by a sheriff or a person appointed by a sheriff. The procedure should be the substantially the same as the procedure for seizure of collateral under a security agreement.

RECOMMENDATION 26 — SALE OF GOODS SUBJECT TO LIEN

A lien claimant should have the right to sell the goods 30 days after the debt becomes due. The lien claimant should be required to give notice of the intended sale not less than 20 days prior to the disposition of the goods. The notice should contain a description of the collateral, the amount of indebtedness including any expenses for storage and disposition, and a statement that the goods may be redeemed, and should set out the particulars of the intended sale. The goods may be disposed of by private or public sale, but the lien claimant may not purchase the goods in the case of a private sale.

RECOMMENDATION 27 — COSTS OF REALIZATION SECURED BY LIEN

The lien should secure reasonable costs of seizure and sale, including costs of storage after default in payment.

RECOMMENDATION 28 — SURPLUS OR DEFICIENCY

A debtor should be liable to the lien claimant for any deficiency following sale. A surplus should distributed first to any subordinate secured parties or lien claimants who have perfected their interests, then to any other person who has notified the lien claimant, and then to the debtor or any other person known to be the owner. The lien claimant should be entitled to pay the surplus into Court where there is a question concerning entitlement to the money.

RECOMMENDATION 29 — RETENTION OF GOODS IN SATISFACTION OF OBLIGATION

A lien claimant should be have the right to propose to retain the goods in satisfaction of the obligation. The lien claimant should be required to give a notice of intention to the debtor and other interested parties. If the debtor or other interested party objects, the lien claimant should be required to conduct a sale or obtain an order of a Court dispensing with the objection.

RECOMMENDATION 30 — REDEMPTION OF GOODS

A debtor or other interested party should have the right to redeem the goods by satisfying the amount of the lien and any reasonable costs of storage and seizure.

RECOMMENDATION 31 — SUPERVISORY POWER OF COURT

The Court should be empowered to make orders to ensure compliance with the Act, to give directions, relieve compliance or stay enforcement, to determine questions of priority or to make any other order that is necessary to ensure protection of the interests of any person in the goods.

RECOMMENDATION 32 — GOOD FAITH AND COMMERCIAL REASONABLENESS

The parties should be under a duty to exercise or discharge all rights, duties or obligations in good faith and in a commercially reasonable manner. A person to whom an obligation or duty is owed should have a right to recover damages for loss that was reasonably foreseeable as liable to result from a failure to meet this standard.

RECOMMENDATION 33 — DEEMED DAMAGES

A lien claimant who without reasonable excuse fails to comply with the duty to provide the debtor with a copy of the financing statement or the duty to amend or discharge a financing statement is liable to pay deemed damages to the person named as debtor. The right to claim deemed damages should also be available to a debtor where consumer goods are involved. The amount of the deemed damages should be the same as the amount of deemed damages prescribed under the PPSA.

RECOMMENDATION 34 — DISPUTE RESOLUTION

Where there is a dispute about the amount of the lien or the right of the lien claimant to take or retain possession of the goods, the owner should be entitled to pay into Court the full amount claimed by the lien claimant. Upon doing so, the owner should be entitled to a release of the goods if retained by the lien claimant and the lien is discharged. In its place, the lien claimant should have a charge on the money paid into Court. The owner should be permitted to include an offer of settlement in the application. The charge on the money paid into Court should be discharged if an offer of settlement is not accepted or the lien claimant does not commence action to recover the money within 90 days.

TABLE A

IMPLEMENTATION OF RECOMMENDATIONS

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PART IV — DRAFT LEGISLATION

LIENS ACT

1 In this Act,

(a) "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

(b) "Court" means the Court of Queen's Bench;

(c) "debtor" means the person who is indebted to the lien claimant;

(d) "financing statement" means a financing statement as defined in the *Personal Property Security Act*;

(e) "lien" means a lien created by this Act;

(f) "lien claimant" means a person who is entitled to claim a lien on goods under this Act;

(g) "logs or timber" means logs and timber which have been severed and trimmed but not further processed;

(h) "Registrar" means the Registrar of the Registry;

(i) "Registry" means the Personal Property Registry under the *Personal Property Security Act*.

NATURE AND EXTENT OF LIEN

2(1) A person has a lien on goods in respect of which the person has expended labour or skill for the purpose of improving, restoring or maintaining its condition or properties.

(2) A storer has a lien on goods that have been stored.

(3) An innkeeper, boarding house keeper or lodging house keeper has a lien on goods brought on to the premises by the guest or lodger.

(4) A common carrier has a lien on goods for carriage charges in respect of which a bill of lading has been issued.

(5) A thresher has a lien on any grain that the thresher has cut or threshed.

(6) A forestry worker has a lien on logs or timber in respect of which the forestry worker has rendered labour or services and any logs or timber which have been mixed with the logs or timber in respect of which the labour or services were rendered.

3(1) A lien secures the amount that the debtor agreed to pay for the services.

(2) If no amount has been agreed upon, the lien secures the fair value of the services rendered.

4(1) A lien attaches to the goods on the commencement of the services giving rise to the lien.

(2) Subject to subsection (4), a lien attaches only to the goods owned by the debtor or goods in respect of which the owner has authorized the debtor to obtain the services giving rise to the lien.

(3) For the purposes of subsection (2), a secured party is not considered to be the owner of goods subject to a security interest.

(4) A forestry worker's lien attaches to logs and timber that are

(a) owned by the debtor,

(b) owned by a person who

(i) has engaged the debtor to carry out the forestry work, or

(ii) has engaged a person to carry out the forestry work and that person contracts out all or part of the work to the debtor.

(5) A lien mentioned in subsection (4) only secures the amount owing by the owner to the person with whom the owner contracted at the time the owner is notified of the lien.

(6) A forestry worker may notify the owner of a lien by giving the owner a notice setting out

(a) the identity of the lien claimant,

(b) the amount of the lien, and

(c) a description of the timber or logs subject to the lien.

5(1) Subject to subsections (2) and (4), a lien is enforceable against the debtor or a third party only where

(a) the goods are in the possession of the lien claimant, or

(b) the debtor has signed an acknowledgment of the indebtedness which includes a description of the goods subject to the lien.

(2) For the purposes of subsection (1)(a), a lien claimant is deemed not to have possession of goods that are in the apparent possession or control of the debtor or the debtor's agent.

(3) An acknowledgment of indebtedness under subsection (1)(b) is without prejudice to the right of the debtor or any other person to dispute the amount the lien claimant is owed.

(4) This section does not apply to a thresher's lien or a forestry worker's lien.

(5) If a lien claimant has not complied with subsection (1) at the time a third party acquires an interest in the goods, a subsequent acquisition of possession or a signed acknowledgment of indebtedness by the lien claimant does not render the lien enforceable against that third party.

6(1) A lien claimant shall use reasonable care in the custody and preservation of goods in the lien claimant's possession, unless a higher standard of care is imposed by law.

(2) Unless otherwise agreed, if the goods are in the possession of the lien claimant or a sheriff

(a) reasonable expenses in obtaining, maintaining and preserving the goods are chargeable to the debtor and secured by the lien,

(b) the risk of loss to the extent of any deficiency in any insurance coverage is on the debtor, and

(c) the lien claimant or sheriff shall keep the goods identifiable, except that fungible goods may be co-mingled.

(3) Subject to subsection (1), a lien claimant may use the goods

(a) in the manner and to the extent provided in any agreement with the debtor,

(b) for the purposes of preserving the goods or their value, or

(c) pursuant to an order of the Court.

7(1) The debtor, a creditor, a sheriff, or a person with an interest in the goods may, by a demand in writing containing an address for reply and delivered to the lien claimant, require the lien claimant to send to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, one or more of the following:

(a) a copy of any acknowledgment of indebtedness mentioned in section 5(1);

(b) a statement in writing of the amount of the indebtedness;

(c) a written approval or correction of an itemized list of goods attached to the demand indicating which goods are subject to the lien;

(2) The lien claimant shall comply with the demand made under subsection (1) not later than 10 days after the demand in made, and if, without reasonable excuse, the lien claimant fails to do so or if the reply is incomplete or incorrect, the person making the demand may apply to the Court for an order requiring the lien claimant to comply with the demand.

(3) On an application under subsection (2), the Court may make an order requiring the lien claimant to comply with the demand and if the order is not complied with, may order that the lien is unperfected or extinguished and that any related registration be discharged, and may make any other order it considers necessary to ensure compliance with the demand.

(4) On an application of the lien claimant, the Court may exempt the lien claimant in whole or in part from complying with subsection (2), or may extend the time for compliance.

8 A lien claimant may in writing assign a lien.

9(1) A lien is not extinguished by reason only that the lien claimant has allowed a period of credit for the payment of the debt to which the lien relates.

(2) If a lien claimant takes a security interest in goods subject to a lien in order to secure the amount of the lien, the lien claimant is deemed to have taken the security interest in substitution of the lien.

PERFECTION AND PRIORITY OF LIEN

10(1) Possession of the goods by the lien claimant or by a person acting on behalf of the lien claimant perfects a lien.

(2) For the purposes of subsection (1), a lien claimant does not have possession of goods

(a) in the actual or apparent possession or control of the debtor or the debtor's agent;

(b) while the goods are held as a result of a seizure or repossession.

11 Registration of a financing statement perfects a lien.

12 A lien perfected under section 10 remains perfected for the first 15 days after the goods come under the control of the debtor.

13 A lien on goods

(a) is subordinate to the interest of

(i) a person who causes the goods to be seized under legal process to enforce a judgment,

(ii) an execution creditor entitled by law to participate in the distribution of goods or its proceeds seized under legal process as provided for in the Execution Creditors Act, and

(iii) a representative of creditors, but only for the purposes of enforcing the rights of a person referred to in subclause (i)

if the lien is unperfected at the time the person mentioned in subclause (i) or (ii) delivers a writ of execution to the sheriff under section 10(2) of the Execution Creditors Act;

(b) is not effective against

(i) a trustee in bankruptcy if the lien is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the *Winding-Up Act* (Canada) if the lien is unperfected at the date the winding-up order is made;

(c) is subordinate to the interest of a transferee who gives value and acquires the interest without knowledge of the lien before the lien is perfected;

(d) is subordinate to a security interest that is perfected during a time when the lien has attached but is not perfected.

14(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any non-possessory lien on the goods whether or not the buyer or lessee has knowledge of it.

(2) A buyer or lessee of goods that are acquired as consumer goods takes free of any lien on the goods if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the lien.

(3) Subsection (2) does not apply to a lien on goods the purchase price of which exceeds $1000 or, in the case of a lease, the market value of which exceeds $1000.

(4) A buyer or lessee takes free of a lien that is temporarily perfected under section 12 during the 15-day period, if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the lien.

15(1) A lien that is continuously perfected has priority over earlier liens.

(2) Priority between a lien that has not been continuously perfected and an earlier lien is determined by the order of perfection of the liens.

(3) A perfected lien has priority over an unperfected lien.

(4) Priority between unperfected liens is determined by the order of attachment of the liens.

REGISTRATION

16(1) A lien may be registered by registration of a financing statement at the Registry.

(2) A financing statement may be registered before a lien attaches.

(3) A registration may relate to one or more than one lien.

(4) A registration under this Act is effective for a period of one year, and may be renewed for further periods of one year.

(5) A registration may be renewed by registering a financing change statement at any time before the registration expires.

(6) An amendment to a registration may be made by registering a financing change statement at any time during the period that the registration is effective, and the amendment is effective from the date that the financing change statement is registered to the expiry of the registration being amended.

(7) A lien claimant shall give to each person named as a debtor in a financing statement

(a) a printed copy of the financing statement, or

(b) a copy of the statement used by the Registry to confirm the registration

not later than 20 days after the financing statement is registered.

17(1) Where a lien is registered and

(a) the indebtedness with respect to the lien is paid, or

(b) the lien claimant is not entitled to claim a lien in respect of the goods described in the registration,

the debtor or any other person with an interest in goods that fall within the description of the goods in the registration may give a written demand to the lien claimant.

(2) A demand referred to in subsection (1) shall require that the lien claimant, not later than 40 days after the demand is given, either

(a) register a financing change statement discharging the registration or amending it by excluding the description of goods that are not subject to a lien, or

(b) provide to the Registrar an order of the Court confirming that the registration need not be amended or discharged.

(3) If a lien claimant fails to comply with a demand referred to in subsection (1), the person giving the demand may register the financing change statement referred to in subsection (2)(a) on providing the Registrar satisfactory proof that the demand has been given to the lien claimant.

(4) A demand referred to in subsection (1) may be given in accordance with section 27 or by registered mail addressed to the address of the lien claimant as it appears on the financing statement.

(5) The Court, on application by the lien claimant, may order that the registration be maintained, discharged or amended.

(6) No fee shall be charged and no amount shall be accepted by a lien claimant for compliance with a demand referred to in subsection (1).

ENFORCEMENT OF LIEN

18(1) Seizure of property to enforce a lien shall be made only by a sheriff.

(2) No seizure referred to in subsection (1) shall be made unless the secured party or an agent of the secured party has executed and delivered a warrant in the prescribed form to the sheriff who is to carry out the seizure.

(3) A sheriff may refuse to make or continue a seizure referred to in subsection (1) unless the sheriff is furnished with security sufficient to cover the sheriff's fees

and expenses and to indemnify the sheriff for anything done in relation to a seizure including indemnification for claims by the debtor or any third party.

(4) Section 38(2) and (3) of the Seizures Act apply to any bond provided to the sheriff pursuant to subsection (3).

(5) To make a seizure of property, the sheriff may

(a) take physical possession of the goods,

(b) give to the debtor or the person in possession of the goods a notice of seizure in the prescribed form,

(c) post in some conspicuous place on the premises on which the goods are located at the time of seizure a notice of seizure in the prescribed form, or

(d) affix to the goods a sticker in the prescribed form,

and seizure by the sheriff shall continue until possession of the goods are surrendered to the lien claimant, or the seizure has been released.

(6) At any time after making a seizure, the sheriff may appoint the debtor or other person in possession of the goods seized as bailee of the sheriff or the debtor or such other person executing a written undertaking in the prescribed form to hold the goods as bailee for the sheriff and to deliver up possession of the goods to the sheriff on demand and property held by a bailee is deemed to be held under seizure by the sheriff.

(7) Section 23 of the Seizures Act applies to a sheriff making a seizure referred to in subsection (1).

(8) When a seizure referred to in subsection (1) occurs, a sheriff, on the written request of a person who on reasonable grounds claims to have an interest in or a right to goods seized by the sheriff, shall deliver to such person a list of items of goods seized which fall within the general description of goods in or to which such person claims to have an interest.

(9) On making a seizure referred to in subsection (1), a sheriff may surrender possession or the right of possession of the goods seized to the lien claimant or to a person designated in writing by the lien claimant.

(10) A sheriff may before or after seizure of goods, give a notice to the lien claimant named in the warrant under which the seizure was made indicating that the seizure shall be released at a date specified in the notice unless before that date the lien claimant takes possession of the seized goods.

(11) If the person to whom the notice referred to in subsection (10) is given does not take possession of the goods referred to in the notice on or before the date specified, the sheriff may release the seizure.

(12) After surrender of possession as provided in subsection (9) or release of seizure as provided in subsection (11), the sheriff has no liability for loss or damage to the goods or for unlawful interference with the rights of the debtor or any other person who has rights in or to the goods, occurring after the surrender or release.

(13) A seizure referred to in subsection (1) shall not affect the interest of a person who under this Act or under any other law has priority over the rights of the lien claimant.

(14) The powers that a sheriff has under this section may be exercised by a person appointed by the sheriff.

19(1) In this section, "mobile home" means

(a) a vacation trailer or house trailer, or

(b) a structure, whether ordinarily equipped with wheels or not, that is designed to be moved from one point to another by being towed or carried and to provide living accommodation for 1 or more persons.

(2) When a mobile home is seized to enforce a lien and the mobile home is occupied by the debtor or some other person who fails, on demand, to deliver up possession of the mobile home, the person who has authorized the seizure may apply to the Court under section 24 for an order directing the occupant to delver up possession of the mobile home.

(3) The order may provide that if the occupant fails to deliver up possession of the mobile home within the time specified in the order, the sheriff shall eject and remove the occupant together with all goods in the mobile home, and the sheriff may take any reasonable steps necessary to obtain possession of the mobile home.

(4) The sheriff may act under subsection (3) only after an affidavit has been filed with him indicating that a copy of the Court order has been served on the occupant of the mobile home and stating that the occupant has failed to deliver up possession of it as required by the order.

20(1) Goods subject to a lien may be sold in their existing condition or after any repair, processing or preparation for sale, and the proceeds of sale shall be applied in the following order:

(a) the reasonable expenses of enforcing the lien, holding, repairing, processing or preparing for sale and selling the goods and any other reasonable expense incurred by the lien claimant, and

(b) the satisfaction of the obligations secured by lien.

(2) If the debtor fails to pay the debt within 30 days from the day it was due, the lien claimant may sell the goods.

(3) The goods may be sold:

(a) by private sale;

(b) by public sale, including public auction or closed tender;

(c) as a whole or in commercial units or parts;

(4) Not less than 20 days prior to the sale of the goods, the lien claimant shall give notice of sale to

(a) the debtor or any other person who is known by the lien claimant to be an owner of the goods,

(b) a creditor or person with a security interest or lien in the goods whose interest is subordinate to that of the lien claimant, and

(i) who has, prior to the date that the notice of disposition is given to the debtor, registered a financing statement according to the name of the debtor or according to the serial number of the goods when it is required or permitted for registration, or

(ii) whose security interest or lien is perfected by possession at the time the secured party seized or repossessed the goods,

and

(c) any other person with an interest in the goods who has given notice to the lien claimant prior to the date that the notice of sale is given to the debtor.

(5) The notice referred to in subsection (4) shall contain

(a) a description of the goods,

(b) the amount required to satisfy the indebtedness secured by the lien,

(c) the amount of the applicable expenses referred to in subsection (1)(a) or, where the amount of such expenses has not been determined, a reasonable estimate,

(d) a statement that, on payment of the amounts due under clauses (b) and (c), any person entitled to receive the notice may redeem the goods,

(e) a statement that, unless the goods are redeemed the goods will be disposed of and the debtor may be liable for any deficiency, and

(f) the date, time and place of any public sale or the date after which any private sale of the goods is to be made.

(6) The notice required under subsection (4) may be given in accordance with section 27 or, where notice is to be given to the person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(7) The lien claimant may buy the goods only at a public sale and only for a price that bears a reasonable relationship to the market value of the goods.

(8) When a lien claimant sells goods to a good faith buyer for value who takes possession of them, the buyer acquires the goods free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the lien claimant

whether or not the requirements of this section have been complied with by the lien claimant.

(9) The notice referred to in subsection (4) is not required if

(a) the goods are perishable;

(b) the lien claimant believes on reasonable grounds that the goods will decline substantially in value if not immediately sold;

(c) the cost of care and storage of the goods is disproportionately large relative to their value;

(d) the Court, on *ex parte* application, is satisfied that a notice is not required;

(e) after default, every person entitled to receive a notice of disposition under subsection (4) consents to the disposition of the goods without notice.

21(1) Where a lien secures an indebtedness and the goods have been sold in accordance with section 20, any surplus shall, unless otherwise provided by law or by the agreement of all interested persons, be accounted for and paid in the following order to

(a) a person who has a subordinate security interest or lien in the goods

(i) who has, prior to the distribution of the proceeds, registered a financing statement according to the name of the debtor or according to the serial number of the goods where it is required or permitted for registration, or

(ii) whose interest was perfected by possession at the time the goods were seized,

(b) any other person who has an interest in the goods, if that person has given a written notice of the interest to the lien claimant prior to distribution of the proceeds, and

(c) the debtor or any other person who is known by the lien claimant to be the owner of the goods

but the priority of the interest in the surplus of a person referred to in clause (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

(2) Where there is a question as to who is entitled to receive payment under subsection (1), the lien claimant may pay the surplus in to the Court and the surplus shall not be paid out except on an application by a person claiming an entitlement to the surplus.

(3) Within 30 days after receipt of the written notice of a person referred to in subsection (1), the lien claimant shall provide to that person a written accounting of

(a) the amount realized from the sale under section 20,

(b) the manner in which the goods were sold,

(c) the amount of expenses deducted as provided in sections 6 and 19,

(d) the distribution of the amount received from the sale, and

(e) the amount of any surplus.

(4) Unless otherwise agreed, or unless otherwise provided in this or any other Act, the debtor is liable for any deficiency.

22(1) The lien claimant may propose to take the goods in satisfaction of the indebtedness, and shall give a notice of the proposal to

(a) the debtor or any other person who is known by the lien claimant to be the owner of the goods,

(b) a creditor or person who has a security interest or lien in the goods whose interest is subordinate to that of the lien claimant, and

(i) who has registered a financing statement according to the name of the debtor or according to the serial number of the goods where it is required or permitted for registration, or

(ii) whose interest was perfected by possession at the time the goods were seized,

(c) any other person with an interest in the goods who has given a written notice to the lien claimant of an interest in the goods prior to the date that notice is given to the debtor, and

(d) the sheriff, unless possession or seizure has been surrendered or released by the sheriff.

(2) If any person who is entitled to notification under subsection (1) and whose interest in the goods would be adversely affected by the lien claimant's proposal gives to the lien claimant a written notice of objection not later than 15 days after giving the notice under subsection (1), the lien claimant shall dispose of the goods in accordance with section 20.

(3) If no notice of objection is made, the lien claimant is, at the expiry of the 15-day period referred to in subsection (2), deemed to have irrevocably elected to take the goods in satisfaction of the indebtedness secured by it, and is entitled to hold or dispose of the goods free from all rights and interest of the debtor and any person entitled to receive a notice

(a) under subsection (1)(b), and

(b) under subsection (1)(c) whose interest is subordinate to that of the lien claimant,

who has been given the notice.

(4) The notice required under subsection (1) or (2) may be given in accordance with section 27 or, if it is to be given to a person who has registered a financing statement, by registered mail addressed to the address of the person to whom it is to be given as it appears on the financing statement.

(5) The lien claimant may require any person who has made an objection to the proposal to furnish proof of that person's interest in the goods and, unless the person furnishes the proof not later than 10 days after the lien claimant's demand, the lien claimant may proceed as if no objection had been received from that person.

(6) On application by a lien claimant, the Court may determine that an objection to the proposal of a lien claimant is ineffective on the grounds that

(a) the person made the objection for a purpose other than the protection of that person's interest in the goods, or

(b) the market value of the goods is less than the total amount owing to the lien claimant and the costs of sale.

(7) Where a lien claimant sells the goods to a good faith buyer for value who takes possession of them, the buyer acquires the goods free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor, and

(c) an interest subordinate to that of the lien claimant

whether or not the requirements of this section have been complied with by the lien claimant.

23 At any time before the lien claimant has sold the goods or contracted for their sale under section 20 or before the lien claimant is deemed to have irrevocably elected to take the goods under section 22, any person entitled to receive a notice of disposition under section 19(4) may, unless otherwise agreed in writing, redeem the goods by tendering fulfilment of all indebtedness secured by the lien together with payment of a sum equal to the reasonable expenses of seizing, holding, repairing, processing and preparing for sale and any other reasonable expenses incurred by the lien claimant.

24(1) On application by a debtor, a creditor of a debtor, a lien claimant, a secured party, a sheriff or a person with an interest in the goods, the Court may

(a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Act,

(b) give directions to any person regarding the exercise of rights or discharge of obligations under this Act,

(c) relieve any person from compliance with the requirements of section 6 and sections 18 to 23,

(d) stay enforcement of rights provided section 6 or sections 18 to 22, or

(e) make any order necessary to ensure protection of the interests of any person in the goods.

(2) On application of an interested person, the Court may

(a) make an order determining questions of priority or entitlement to the goods;

(b) direct an action to be brought or an issue to be tried.

(3) An application under this Act shall be made by originating notice unless it is further to proceedings that have been commenced.

25(1) Where a lien claimant has possession of goods and there is

(a) a dispute concerning the amount of the lien, including any question relating to the quality of the services rendered,

(b) a dispute concerning the services that were authorized,

(c) a dispute concerning the right of the lien claimant to take or return possession of the goods,

the debtor or other person entitled to the goods may apply to Court to have the dispute resolved and the goods returned.

(2) Subject to subsection (3), the applicant shall pay into Court the full amount claimed by the lien claimant or post security with the Court for that amount.

(3) An applicant may make an offer of settlement and pay into Court the amount offered in settlement together with the balance claimed by the lien claimant or security for the balance.

(4) Where money is paid into Court or security is posted with the Court, the clerk shall issue a certificate setting out details of the payment, security or offer of settlement.

(5) The applicant shall give the certificate to the lien claimant who shall

(a) release the goods, or

(b) file a notice of objection with the Court not later than 3 days after receiving the certificate.

(6) Where an objection has been filed with the Court, the applicant may pay into Court or post security for the additional amount claimed by the lien claimant.

(7) Where goods are released under this section, the lien is discharged and is replaced by a charge on the amount paid into Court or the security posted.

(8) The charge referred to in subsection (7) is discharged 90 days after the goods are returned by the applicant unless the lien claimant has accepted the applicant's offer of settlement or commenced an action to recover the amount claimed.

(9) Upon expiry of the 90 days referred to in subsection (8), the clerk may return to the applicant the money paid into Court or the security posted if the applicant files with the clerk an affidavit confirming that the lien claimant has

neither accepted the applicant's offer of settlement nor commenced an action to recover the amount claimed.

26(1) All rights, powers, duties and obligations arising under this Act shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) If a person fails, without reasonable excuse, to discharge any duties or obligations imposed by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

(3) If a lien claimant, without reasonable excuse, fails to comply with the obligations or limitations

(a) in section 16 or 17, or

(b) in section 6, 7, 20, 21 or 22 and the goods are consumer goods,

the debtor or, in the case of non-compliance section 16 or 17, the person disclosed as a debtor in a registration, shall be deemed to have suffered damages not less than the amount prescribed for deemed damages under the *Personal Property Security Act*.

(4) Except as provided in sections 6, 20, 21, and 23, no provision of sections 6 or 18 to 26, to the extent that it gives rights to the debtor or imposes obligations on the lien claimant, can be waived or varied by agreement or otherwise.

MISCELLANEOUS

27(1) A notice or demand required or permitted to be given under this Act may be given as follows:

(a) to an individual by leaving it with the individual or by registered mail addressed by indicating the individual's name and residence, or the name and place of any business of the person;

(b) to a partnership

(i) by leaving it with

(A) one or more of the general partners, or

(B) a person having at the time the notice is given control or management of the partnership business, or

(ii) by registered mail addressed to

(A) the partnership

(B) any one or more of the general partners, or

(C) any person having at the time the notice is given control or management of the partnership business

at the address of a partnership business;

(c) to a corporation, other than a municipality,

(i) by leaving it with an officer or director of the corporation or person in charge of any office or place of business of the corporation,

(ii) by leaving it with or by registered mail addressed to the registered or head office of the corporation, and

(iii) where the corporation has its registered or head office outside the Province, by leaving it with, or by registered mail addressed to, the attorney for service for the corporation appointed under Part 21 of the Business Corporations Act;

(d) to a municipal corporation by leaving it with, or by registered mail addressed to, the principal office of the corporation or to the chief administrative officer of the corporation;

(e) to an association

(i) by leaving it with an officer of the association, or

(ii) by registered mail addressed to an officer of the association at the address of the officer.

(2) A notice or demand by registered mail is deemed to be given when the addressee actually receives the notice or demand or on the expiry of 4 days after the date or registration, whichever is the earlier.

28(1) This Act applies to every lien that has not been terminated in accordance with prior law before the coming into force of this Act.

(2) A lien which is validly registered under the *Garagemen's Lien Act* is deemed to be registered under this Act for the unexpired portion of the registration and may be continued by registration under this Act.

29 The following are repealed:

(a) *Beet Lien Act*;
(b) *Garagemen's Lien Act*;
(c) *Possessory Liens Act*;
(d) *Livery Stable Keepers Act*;

(e) *Thresher's Lien Act;*
(f) *Warehousemen's Lien Act;*
(g) *Woodmen's Lien Act.*

30 Sections 2 to 6 of the Innkeepers Act are repealed.

ADDENDUM

ENTITLEMENT TO LIEN — ALTERNATIVE PROPOSAL

The following changes should be made to the recommendations and draft legislation to implement the alternative proposal discussed on pages 69 to 73 of Chapter 5. These changes would restrict the classes of lien claimants to those that are entitled to liens under the present law. Under this alternative, a lien would not be given to a repairer or other claimant who performs the work on the debtor's premises and never gets possession of the goods.

Changes to the Recommendations

Replace Recommendation 8 with the following:

RECOMMENDATION 8 — ENFORCEABILITY

A lien should be enforceable against the debtor or third parties only if the goods are in the continuous possession of the lien claimant or the debtor has signed an acknowledgment of the indebtedness which includes a description of the goods subject to the lien before possession of the goods are surrendered to the debtor. A lien claimant should be deemed not to have taken possession of goods that are not in the apparent possession or control of the debtor or the debtor's agent. The signing of the acknowledgment should be without prejudice to the right of the debtor or other person to dispute the amount. The requirement for enforceability should not apply to a thresher's lien or a woodworker's lien.

Changes to the draft Act

1. Replace subsection 5(1) with the following:

5(1) Subject to subsections (2) and (4), a lien is enforceable against the debtor or a third party only where

(a) the goods are in the continuous possession of the lien claimant;

(b) the debtor has signed an acknowledgment of indebtedness before possession of the goods are surrendered to the debtor.

2. Delete subsection 5(5).

PART V — APPENDICES

BEET LIEN ACT

CHAPTER B-3

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta enacts as follows:

Lien on crops

1 A person who

(a) supplies beet seed to a grower of beets,

(b) advances money to a grower of beets for the purchase of beet seed,

(c) furnishes labour for the sowing of beet seed, or

(d) advances money to pay for labour for the sowing of beet seed,

has a lien on all crops of beets grown by the beet grower from the seed.

Extent of lien

2(1) The lien covers

(a) the value of the beet seed supplied or the amount of money advanced for the purchase of beet seed, and

(b) the cost of the labour furnished for sowing seed or the money advanced for the purpose of paying for the labour.

(2) The amount of the lien shall not exceed $4 per acre of the land on which the seed is sown.

Priority

3 Notwithstanding any other Act, no document evidencing the lien need be filed or registered and the lien has priority over every writ of execution, right of distress, encumbrance and charge of every description whatsoever.

GARAGEMEN'S LIEN ACT

CHAPTER G-1

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "farm vehicle" means a farm machine or other machine or equipment

(i) that is identifiable by a manufacturer's serial number cut, embossed or otherwise permanently marked or attached on it,

(ii) that is used, or intended for use, in any type of farming operations, and

(iii) that is not a motor vehicle;

(b) "garageman" means a person who keeps a place of business for the housing, storage or repair of a motor vehicle or farm vehicle and who receives compensation for that housing, storage or repair;

(c) "motor vehicle"

(i) means a vehicle propelled by any power other than muscular power, and

(ii) includes an airplane, but

(iii) does not include a motor vehicle that runs only on rails;

(d) "financing statement" means a financing statement as defined in the *Personal Property Security Act*;

(e) "financing change statement" means a financing change statement as defined in the *Personal Property Security Act*;

(f) "prescribed" means prescribed in the regulations made under the *Personal Property Security Act*;

(g) "Registrar" means the Registrar of the Registry;

(h) "Registry" means the Personal Property Registry under the *Personal Property Security Act*.

Lien of garageman

2(1) In addition to every other remedy that a garageman has for the recovery of money owing to him for

(a) the storage, repair or maintenance of a motor vehicle or a farm vehicle or of any part of a motor vehicle or farm vehicle, or

(b) the price of accessories or parts furnished for a motor vehicle, farm vehicle or part of a motor vehicle or farm vehicle,

a garageman who is entitled to payment of a sum for the storage, repair or maintenance or the price of accessories or parts furnished, has a lien on the motor vehicle or part thereof or the farm vehicle or part thereof for the sum to which he is entitled.

(2) No garageman is entitled to a lien under this Act for the price of fuel, oil or grease furnished for a motor vehicle or farm vehicle.

(3) No garageman is entitled to a lien under this Act unless he retains possession of the motor vehicle or farm vehicle or he obtains from

(a) the person who authorized the storage, repair or maintenance or his authorized agent, or

(b) the person who ordered that accessories or parts be furnished for the motor vehicle or farm vehicle or his authorized agent,

an acknowledgment of indebtedness by requiring that person or his agent to sign an invoice or other statement of account.

Termination of lien

3(1) A lien referred to in section 2 terminates on the 21st day after the day

(a) on which possession of the motor vehicle or farm vehicle is surrendered to the owner or his agent,

(b) on which repairs were completed to the motor vehicle or farm vehicle or any part of the motor vehicle or farm vehicle if the vehicle was not at the time of repair in the possession of the garageman, or

(c) on which the accessories or parts for the motor vehicle or farm vehicle were furnished,

as the case may be, unless on or before the 21st day the garageman registers in the Registry a financing statement indicating a claim of lien on the motor vehicle or farm vehicle.

(2) A financing statement referred to in subsection (1) shall be signed by the garageman or by a person authorized by him.

4 Repealed 1988 cP-4.05 s83.

Postponement of lien
5 Every lien on a motor vehicle or farm vehicle under this Act shall be postponed to an interest in or charge, lien or encumbrance on the motor vehicle or farm vehicle,

(a) that is created or arises

(i) in good faith, and

(ii) without express notice of the first mentioned lien,

and

(b) that was created or arose before the registration of a financing statement referred to in section 3(1).

When 2 or more lienholders
6(1) If at any one time more persons than one have a lien under this Act on the same motor vehicle or farm vehicle,

(a) the person whose claim of lien is registered earlier in time has a prior lien over that of the person whose claim of lien is registered later in time, and

(b) if one of those persons seizes the motor vehicle or farm vehicle, he shall be deemed to have made that seizure on behalf of all persons who have on the motor vehicle or farm vehicle a lien subsisting at the time of seizure.

(2) If at any one time a person has more than one lien under this Act on the same motor vehicle or farm vehicle, seizure of the motor vehicle or farm vehicle under any one of the liens constitutes a seizure in respect of all of the liens of that person on the motor vehicle or farm vehicle.

Term of lien
7(1) On registration of a financing statement pursuant to section 3, the lien continues for a further period of 6 months from the date of the registration.

(2) A lien determines on the expiry of 6 months from the date of registration of a financing statement unless, within that 6-month period,

(a) there is delivered to the sheriff proof satisfactory to the sheriff that the lien is the subject of a subsisting registration in the Registry and a warrant in the prescribed form addressed to the sheriff of the judicial district in which the motor vehicle or farm vehicle that is subject to the lien is for the time being and directing the sheriff to seize the motor vehicle or farm vehicle in accordance with the requirements of the *Seizures Act*, and

(b) seizure of the motor vehicle or farm vehicle that is subject to the lien has been effected.

(3) Notwithstanding subsection (2), when it appears that a seizure cannot be effected within the 6 months provided for in that subsection, the Court of Queen's Bench may, on ex parte application made during those 6 months, extend the time within which the seizure may be made for a further period not exceeding 6 months from the date of the order, and in that case the lien does not determine until the date so specified, if a financing change statement is registered in respect of the order in the Registry prior to the expiration of the 6-month period provided for in subsection (2).

Memorandum of discharge of lien

8 The garageman on receipt of the amount due in respect of the lien he holds shall sign and deliver to a person who demands it a memorandum in writing stating that his lien is discharged.

Seizure of vehicle

9 The sheriff shall, in accordance with the *Seizures Act*, seize the motor vehicle or farm vehicle in respect of which the warrant was issued if it is found anywhere within the judicial district for which the sheriff is appointed.

Seizure of vehicle

10(1) On a seizure of a motor vehicle or farm vehicle pursuant to this Act, the *Seizures Act*, except where expressly otherwise provided in this Act, governs and applies to the seizure, and the lienholder shall, subject to subsection (2), enforce his rights and remedies under this Act in accordance with that Act.

(2) The proceeds of the sale shall be applied first in payment of the expenses of the sale and then in payment of the lienholder's debt, and thereafter payment out of the balance, if any, shall be governed by the provisions of the *Seizures Act* respecting the payments of a surplus remaining after distraint under that Act.

11 Repealed 1988 cP-4.05 s83.

Discharge of lien

11.1(1) Where a financing statement or a financing change statement referred to in section 7(3) is registered and

(a) the indebtedness, with respect to which the lien is claimed and the financing statement or financing change statement has been registered, is paid,

(b) the motor vehicle or farm vehicle has been sold in accordance with section 10, or

(c) the garageman is not entitled to maintain the registration of the financing statement or financing change statement relating to a claim of lien on a motor vehicle or farm vehicle,

the garageman shall discharge the registration by registering a financing change statement.

(2) If a garageman fails to discharge a registration as required by subsection (1), the owner or anyone with an interest in the motor vehicle or farm vehicle may give a written demand to the garageman requiring the garageman to register a financing change statement discharging the registration or an order of the Court of Queen's Bench confirming that the registration need not be amended or discharged.

(3) If a garageman fails to comply with a demand referred to in subsection (2) within 30 days after the demand is given, the person giving the demand may register the financing change statement referred to in subsection (2) on providing to the Registrar satisfactory proof that the demand has been given to the garageman.

(4) A demand referred to in subsection (2) may be given in accordance with section 70 of the *Personal Property Security Act* or by registered mail addressed to the address of the garageman as it appears on the financing statement.

(5) On application to the Court by the garageman, the Court may order that the registration be confirmed or discharged.

(6) No fee shall be charged and no amount shall be accepted by a garageman for compliance with a demand referred to in subsection (2).

(7) If a garageman fails to comply with subsection (1) or the demand referred to in subsection (2), the owner or any person with an interest in the motor vehicle or farm vehicle has a right to recover any loss or damage that was reasonably foreseeable as liable to result from the non-compliance.

Regulations

12 The Lieutenant Governor in Council may make regulations

(a) respecting forms for use under this Act;

(b) repealed 1983 cC-7.1 s21;

(c) governing the manner of issuing, delivering or filing warrants or other documents with sheriffs;

(d) prescribing fees which may be charged in respect of a warrant and a seizure thereunder or any matter incidental thereto.

INNKEEPERS ACT

CHAPTER I-4

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions
1 In this Act,

(a) "inn" means a place of which the innkeeper is the keeper;

(b) "innkeeper" means a person who is by law responsible for the property of his guests and includes a keeper of a hotel, motel, auto court, cabin or other place or house who holds out that to the extent of his available accommodation he will provide lodging to any person who presents himself as a guest, who appears able and willing to pay a reasonable sum for the services and facilities offered and who is in a fit state to be received;

(b.1) "peace officer" means a member of the Royal Canadian Mounted Police, a member of a municipal police service or a special constable;

(c) "vehicle" includes a motor vehicle within the meaning of the *Motor Vehicle Administration Act*, a horse and carriage and chattels used in connection with a vehicle.

Right to detain personal effects
2(1) An inn, boarding house or lodging house keeper

(a) may detain on his premises the trunks and other personal property of a person who is indebted to him for board and lodgings, or either of them, and

(b) is responsible for the safekeeping of the trunks or other personal property detained by him.

(2) If the charges for board and lodging, or either of them, remain unpaid for one month after the beginning of the detention of the trunks or other personal property, the inn, boarding house or lodging house keeper has, in addition to all other remedies provided by law, the right to sell by public auction the trunks and other personal property, on publishing once in a local newspaper at least one week before the intended sale a notice of the intended sale, stating

(a) the name of the person indebted for board and lodging, or either of them,

(b) the amount of the indebtedness,

(c) a description of the property to be sold,

(d) the time and place of sale, and

(e) the name of the auctioneer.

Proceeds of sale

3(1) The inn, boarding house or lodging house keeper

(a) may apply the proceeds of the sale in payment of the indebtedness and the cost of the advertising and sale, and

(b) shall pay over the surplus proceeds, if any, to the person entitled to it on application being made by that person for the surplus.

(2) If an application for the surplus proceeds is not forthwith made, the inn, boarding house or lodging house keeper shall immediately pay the surplus to the Provincial Treasurer to be kept by him for one year on behalf of the owner, after which time, if the amount so kept has not been claimed under subsection (3), the surplus forms part of the General Revenue Fund.

(3) The Provincial Treasurer

(a) may entertain an application, verified by affidavit as he requires, by the owner of or by mortgagee of the personal property sold by public auction pursuant to this Act or by any creditor of the owner of the personal property, and may in his discretion pay all or a portion of the surplus proceeds of the sale to the owner, mortgagee or creditor who appears entitled, or

(b) may informally refer an application to a judge of the Court of Queen's Bench.

(4) The judge to whom the matter is referred

(a) may, if there is more than one claimant, direct interpleader proceedings to be taken, or

(b) may, in any case, and on the production of such evidence as he considers necessary, make any order that seems just to him.

(5) Notwithstanding subsections (3) and (4), the creditors shall be paid according to their priorities.

(6) The order referred to in subsection (4) is sufficient authority for the Provincial Treasurer to pay out according to the terms of the order any surplus proceeds in his possession.

Disputed claims

4(1) If a dispute arises between any inn, boarding house or lodging house keeper and a lodger or guest with regard to the amount claimed from the lodger or guest by the keeper for board or lodgings or both, the lodger or guest

(a) may pay into the office of the clerk of the Court of Queen's Bench the amount of the claim together with a further sum by way of security for costs amounting to either 10% of the amount of the claim or $10, whichever sum is the greater, and

(b) shall thereupon serve notice in writing on the keeper or his manager or clerk that he has paid that amount into Court.

(2) If within 30 days of the receipt of the notice the keeper commences an action against the lodger or guest for the recovery of the amount of his claim, the sum so paid into Court shall not be paid out until the action is disposed of and then the sum shall be paid out in the manner the Court orders.

(3) If the action is not commenced within the period of 30 days of the receipt of the notice, the clerk of the Court shall pay out the sum so paid into Court to the lodger or guest who paid it into court or to any person authorized in writing by the lodger or guest to receive the payment.

(4) All the rights of the keeper with respect to the trunks and other personal property of the lodger or guest cease on and after the service on the keeper of the notice of payment into Court.

Liability for goods lost, stolen or injured

5 No innkeeper is liable to make good to any person who is not registered as an occupant of a room or rooms in his inn any loss of or injury to property brought into his inn, except

(a) when the property has been stolen, lost or injured, through the default or neglect of the innkeeper or his employee, or

(b) when the property has been deposited expressly for safe custody with the innkeeper and a check has been issued for the property.

Posting copy of section 7

6 Every innkeeper

(a) shall keep conspicuously posted in the office of his inn, and in every bedroom ordinarily used for the accommodation of inn guests, a printed or plainly written copy of section 7, and

(b) is entitled to the benefit of this Act only in respect of property that is brought to his inn while the copy of section 7 is posted as required by this section.

Liability of innkeeper
7 An innkeeper is not liable to make good to his guest any loss of or injury to property brought to his inn, except

(a) when the property has been stolen, lost or injured through the wilful act, default or neglect of the innkeeper or his servants,

(b) when the property, other than a vehicle, has been expressly delivered for safe custody to the innkeeper, but the innkeeper may, if he thinks fit, require as a condition of his liability under this clause that the property be deposited in a box or other receptacle and fastened and sealed by the person depositing it, or

(c) when a vehicle has been expressly delivered into the custody of the innkeeper for storage or parking in a place specifically reserved and designated by the innkeeper for the storage or parking of vehicles, in which case the liability of the innkeeper for the vehicle and its contents is that of a bailee for reward.

Failure to provide safe custody
8 If

(a) an innkeeper refuses to receive the property of a guest for custody, or

(b) a guest through any default of the innkeeper is unable to deliver the property to the innkeeper,

as mentioned in section 7, the innkeeper is not entitled to the benefit of this Act in respect of that property unless his inn

(c) was not equipped with a proper safe or vault, or

(d) did not have a place for the storing or parking of vehicles,

as the case may be, and the innkeeper so informed the guest at the time of refusing or failing to receive the property.

Penalties for disturbance
9(1) In this section "disturbance" means a disturbance of the peace and quiet of the occupants of an inn by fighting, screaming, shouting, singing or otherwise causing loud noise.

(2) A person who

(a) causes a disturbance in an inn and, having been requested by the innkeeper or his agent to desist, continues to cause or again causes a disturbance, or

(b) having caused a disturbance, fails to leave the inn forthwith after being requested to do so by the innkeeper or his agent,

is guilty of an offence and liable to a fine of not more than $500 or to imprisonment for 6 months or to both.

(3) An innkeeper or an agent of an innkeeper who

(a) knowing of a disturbance in the inn, fails to request the person causing the disturbance to desist, or

(b) having made such a request and in the case of a continuation or recreation of a disturbance, fails to request the person causing the disturbance to leave the inn forthwith,

is guilty of an offence and liable to a fine of not more than $500 or to imprisonment for 6 months or to both.

Arrest without warrant

10 A peace officer who finds a person committing an offence under section 9(2) or who has reasonable and probable grounds to believe that a person has committed an offence under section 9(2) may arrest him without a warrant.

LIVERY STABLE KEEPERS ACT

CHAPTER L-20

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions
1 In this Act,

(a) "boarding stable keeper" means a person who for a money consideration or its equivalent stables, boards or cares for any animal;

(b) "livery stable keeper" means a person who carries on the business of letting or hiring out

(i) carriages, sleighs or other vehicles, or

(ii) horses or other animals, whether with or without a carriage, sleigh or other vehicle, and whether accompanied by an employee of the livery stable keeper or not,

for a money consideration or the equivalent;

(c) "sales stable keeper" means a person who stables, boards or cares for an animal other than his own, with the intention of selling or disposing of it, and who receives or is to receive payment for those services whether in the nature of a commission or otherwise.

Lien on animals and effects
2(1) A livery stable keeper, boarding stable keeper and sales stable keeper has a lien on the animals and things hereinafter mentioned for the value of any food, care, attendance or accommodation furnished for the animal or thing, and in addition to all other remedies provided by law may detain in his custody and possession

(a) any animal, vehicle, harness, furnishings or other gear appertaining thereto, and

(b) the personal effects of any person who is indebted to him for stabling, boarding or caring for the animal.

(2) The right of detention by a livery stable keeper, boarding stable keeper or sales stable keeper of the animal or thing has priority over and is not subject to any existing lien, security interest as defined in the *Personal Property Security Act*

or other charge or encumbrance of whatever nature or kind affecting that animal or thing.

Care of animals and effects detained
3 When a livery stable keeper, boarding stable keeper or sales stable keeper exercises the right provided by this Act to detain animals or things

(a) he shall keep them in his possession, and

(b) he is responsible for their proper care,

during the time he detains them.

Notice of sale
4(1) If the owner does not reclaim the animals or things by discharging his indebtedness within one month from the time it was incurred, the keeper may by public auction sell the animals or things on giving 2 weeks' notice of sale

(a) by advertisement in the newspaper published nearest to his stable or if more than one newspaper is published in the same locality, then in either of them, and

(b) by posting up notices of the intended sale in the stable.

(2) The notice of sale shall state, if known,

(a) the names of the owner or the person or persons who brought the animals or things to the stable,

(b) the amount for which a lien is claimed,

(c) a description of the animals or things, and

(d) the name of the seller.

Application of proceeds of sale
5 The proceeds derived from the sale by public auction shall be applied

(a) in paying the expenses incurred by the detention, advertising and sale,

(b) in satisfying the lien of the keeper, and

(c) in paying the surplus, if any, to the person entitled thereto if that person applies for the surplus.

Disposition of surplus

6(1) If the person entitled to the surplus proceeds of sale does not apply for the surplus within one month from the date of the sale then the surplus shall be paid over to the Provincial Treasurer to be kept by him in a special trust account for one year, after which time if the owner has not by then appeared or claimed the surplus it shall be paid over to and belongs to the General Revenue Fund.

(2) The Provincial Treasurer may

(a) entertain an application, verified by affidavit as the Provincial Treasurer may require, from a mortgagee of the property sold or by a creditor of the former owner of the property, and in his discretion pay all or a portion of the surplus to the mortgagee or creditor according to his entitlement, or

(b) informally refer the matter to a judge of the Court of Queen's Bench.

(3) The judge to whom the matter is referred may

(a) direct interpleader proceedings to be taken if there are more claimants than one, or

(b) in any case, on the production of such evidence as he considers necessary, make any order that to him seems just.

(4) Notwithstanding subsection (2) and (3), creditors shall be paid according to their priorities.

(5) The order of the judge is sufficient authority for payment by the Provincial Treasurer in accordance with the terms of the order of any of the surplus money in his possession.

Posting Act in stable

7 Every livery stable keeper, boarding stable keeper or sales stable keeper shall hang or post a copy of this Act in a conspicuous place in every stable owned or operated by him and in case of non-compliance with this section he is not entitled to the benefit of this Act.

Cleansing of stable

8(1) Every livery stable keeper, boarding stable keeper and sales stable keeper shall yearly in the months of April and October thoroughly cleanse all the stalls, mangers and feed boxes in the stable

(a) by thoroughly washing the stalls, mangers and feed boxes with soap and hot water, and

(b) by immediately afterwards thoroughly applying to every part of the stalls, mangers and feed boxes a solution of 4 grams of bichloride of mercury to 10 litres of water.

(2) A livery stable keeper, boarding stable keeper or sales stable keeper who fails during both of the months of April and October in any year to do such cleansing or cause it to be done is guilty of an
offence and liable for the first offence to a fine of not more than $10 and for a subsequent offence to a fine of not more than $25.

POSSESSORY LIENS ACT

CHAPTER P-13

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definition
1 In this Act, "Court" means the Court of Queen's Bench.

Lien on chattels
2 A person has a particular lien for the payment of his debt on a chattel on which he has expended his money, labour or skill at the request of the owner of it and thereby enhanced its value.

Lien of wharfinger
3 A wharfinger has a particular lien for his lawful charges on a chattel entrusted to his keeping.

Lien of bailee
4(1) A bailee, whether gratuitous or for reward, has a particular lien on a chattel bailed to him by the owner of it for any charges that are due to the bailee under the terms of the contract of bailment.

(2) In addition to the particular lien mentioned in subsection (1), or if there is nothing due to him under the terms of the contract of bailment, the bailee has a particular lien on the chattel for his reasonable charges for caring for it

(a) after the time fixed in the contract of bailment for the termination of that contract has expired, or

(b) if there is no time fixed by the contract or if there is no contract of bailment, then after the expiration of the time specified in a notice given by the bailee to the bailor to take possession of the chattels.

(3) The Court may dispense with the giving of the notice by the bailee if the bailor's address or whereabouts is unknown.

Possession of property
5 Actual or constructive and continued possession of the property that is the subject matter of the debt is essential to the existence of the lien.

Extent of lien
6 A lien extends over all the property on which the lienholder has expended his money, labour or skill, but no lien arises on account of a general balance due from the owner of the property to the lienholder.

Waiving of right to lien
7 The right to a lien under this Act may be waived by an express agreement in writing based on legal consideration and made between the parties at the time the contract out of which the lien arises was made or at any time thereafter.

Detention of property
8 A person entitled to a lien on any property pursuant to this Act may detain the property in his possession until the amount of his debt has been paid.

Storage charges
9(1) If the contract out of which the lien arises provides for the payment of storage charges in respect of the property detained, the person entitled to a lien on the property

(a) may make lawful charges for the storage of it during the period of the detention, and

(b) may add the amount of those charges to his debt.

(2) If the contract out of which the lien arises relates to any kind of motor vehicle as defined in the *Motor Vehicle Administration Act* and if the contract makes no provision for the payment of storage or otherwise, the person entitled to a lien on the motor vehicle

(a) may make ordinary and reasonable charges for the storage of it during the period of detention, and

(b) may add the amount of those charges to his debt.

(3) When a bailee has in his possession perishable goods that might deteriorate or be destroyed by detention,

(a) he may forthwith apply to the Court for leave to sell the goods, and

(b) on the application the Court may forthwith give directions for the sale of goods or may make any order in the matter that seems just to it.

Notice to debtor
10(1) If

(a) the debt and storage charges, if any, are unpaid at the expiration of 3 months in the case of a motor vehicle and of 6 months in the case of any other property, from the time when the relation of creditor and debtor arose with respect to the alteration or repair or the bailment of the property, or

(b) the chattel is not taken by the bailor at or before the expiration of the time specified for taking it in the contract of bailment, or at or

before the expiration of the time specified in the notice referred to in section 4,

the lienholder may serve a notice on his debtor by registered mail or personal service.

(2) The notice shall specify

(a) a reasonable time and place for payment of the debt,

(b) the amount owing and the property detained, and

(c) that in default of payment an application will be made to the Court on the day and at the hour and place stated in the notice for leave to sell the chattel.

(3) The day fixed for the application to the Court shall be not less than 30 days after the date of mailing or serving the notice.

(4) If the amount claimed is not paid to the bailee

(a) the bailee may apply on the day and at the hour and place specified in the notice to the Court informally for a sale of the chattel, and

(b) the Court may make any order that seems just to it with respect to the sale.

(5) Unless the Court otherwise directs, it is not necessary to take out an order for sale, but the Court may note informal directions for the sale on the notice or on any affidavit that is used.

(6) If

(a) a dispute arises between the bailor and bailee as to the amount due, or

(b) the bailor does not appear at the time and place referred to in subsection (4)

the Court may fix the amount due in a summary way or direct an action to be brought.

Substituted service

11 If it is made to appear to the Court that it is not practicable to serve a notice required to be given by this Act on a debtor, either personally or by registered mail, the Court may, on the application ex parte by or on behalf of the lienholder, make an order for substituted or other service or for the substitution for service of notice by letter, public advertisement or otherwise, or may dispense with service.

Disposal of property valued at less than $300
11.1(1) Notwithstanding section 10,

(a) if

(i) the debt and storage charges, if any, are unpaid at the expiration of 3 months in the case of a motor vehicle and of 6 months in the case of any other property, from the time when the relation of creditor and debtor arose with respect to the alteration or repair or the bailment of the property,

or

(ii) the chattel is not taken by the bailor at or before the expiration of the time specified for taking it in the contract of bailment, or at or before the expiration of the time specified in the notice referred to in section 4,

and

(b) if the lienholder believes on reasonable grounds that the chattel has a total market value of less than $300,

the lienholder may sell the property by a means and for a price that he believes is reasonable.

(2) If no person purchases the chattel put up for sale under subsection (1) within a reasonable time, the lienholder may dispose of the chattel in any manner that he believes is reasonable in the circumstances.

Application of proceeds of sale
12(1) The proceeds of the sale shall be applied first in payment of the expenses of the sale and then in payment of the lienholder's debt, and the balance, if any, shall be paid to the person entitled to it on application by him for it.

(2) If application under subsection (1) is not made forthwith,

(a) the officer conducting the sale under section 10, or

(b) the lienholder or his agent conducting the sale under section 11.1,

shall immediately pay the balance to the Provincial Treasurer.

(2.1) The Provincial Treasurer shall keep the money he receives under subsection (2) on behalf of the person entitled to it for 1 year from the day he receives the money and, if that person does not make a claim for that money within that year or, if a claim is made within that year but is not upheld, that money shall be paid into the General Revenue Fund.

(3) The Provincial Treasurer may entertain an application, verified by affidavit as he requires, on the part of a mortgagee of the chattel so sold, or on the part of a creditor of the owner of the chattel, and may in his discretion

(a) make an order for the payment of all or a portion of the balance to the mortgagees or creditors according to their priorities, or

(b) informally refer the facts to the Court.

(4) Where the Provincial Treasurer refers facts to the Court under subsection (3), the Court may direct interpleader proceedings to be taken if there is more than one claimant, or in any case may on the production of evidence that it considers necessary make an order that to it seems just.

(5) An order made under subsection (4) is sufficient authority for the Provincial Treasurer to pay any money in his possession according to the tenor of the order.

Application of Act

13 This Act

(a) applies only to cases of lien where

(i) there is no provision for realizing by sale in any other statute, and

(ii) no provision is made in any other statute for determining the rights of the owner of the goods and chattels and the bailee,

and

(b) in particular does not apply to a lien given under the *Innkeepers Act*, the *Livery Stable Keepers Act* or the *Warehousemen's Liens Act*.

General liens

14 Nothing in this Act affects the law respecting general liens.

THRESHERS' LIEN ACT

CHAPTER T-4

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Lien on grain threshed

1(1) A person who threshes grain or causes grain to be threshed for another person at or for a fixed price or rate of remuneration has, from the date of the commencement of the threshing until 60 days after the completion of the threshing, a lien on that grain for the purpose of securing payment of the price or remuneration.

(2) A person who cuts or threshes grain or causes grain to be cut and threshed for another person with a harvester thresher, combination thresher or any other implement that both cuts and threshes grain, at or for a fixed price or rate of remuneration has, from the date of the commencement of the cutting until 60 days after the completion of the cutting and threshing, a lien on the grain for the purpose of securing payment of the price or remuneration.

Priority

2(1) The lien has priority

(a) over all writs of execution against the owner of the grain,

(b) over all security interests as defined in the *Personal Property Security Act*, or conveyances, made by the owner of the grain, and

(c) over all rights of distress for rent reserved on the land on which the grain is grown,

and the person performing the work of threshing or cutting and threshing or procuring it to be done shall be deemed a purchaser for value of the grain that he takes pursuant to this Act.

(2) The amount for which a lien under this Act has priority as against a creditor of the owner of any grain shall not exceed the amount that represents a fair remuneration for threshing or cutting and threshing grain, as the case may be, having regard to the usual and ordinary charges for so doing for the time being prevailing in the locality in which the grain was threshed or cut and threshed, and to all the circumstances of the threshing or cutting and threshing.

(3) If the grain threshed or cut and threshed is sold and delivered to a bona fide purchaser and removed from the possession of the original owner and from the premises and vicinity where it was threshed, the lien ceases to exist but becomes

a first charge on so much of the price as remains unpaid when notice of the lien is given to the purchaser.

(4) If the grain threshed or cut and threshed is delivered by the owner to a person who advances money on the security of it, all advances made by that person, in good faith, before receiving notice of the thresher's lien take priority over the lien.

Seizure of grain by lienholder

3 A lienholder may, after having given to the owner of the grain written notice of his intention to do so, take a sufficient quantity of the grain to secure payment of the price or remuneration, or of that part or proportion of it that is earned at the time of the taking, unless the owner in the meantime pays the price or remuneration or the part or proportion of it that is earned at the time of notice given.

Quantity of grain to be taken

4(1) The quantity of grain that may be taken shall be a sufficient quantity, computed as in subsection (2) to pay, when sold, for the threshing or cutting and threshing of all grain threshed or cut and threshed by the person taking the grain for the owner of it during that same season.

(2) The value of any grain taken shall be its market value at the nearest market, less 1.5¢ per bushel in the case of oats, and 2¢ per bushel in the case of all other grain, for each 5 miles or fractional part thereof between the place of threshing and the nearest available market for hauling it to and delivering it at the market.

Storage and sale of grain

5 The person taking the necessary estimated quantity of grain may forthwith store it in his own name in a public elevator or at the thresher's risk in any other suitable storing place, and if, at the expiration of 5 days from the taking, the price or remuneration for the threshing or cutting and threshing has not been paid, he may sell the grain at a fair market price.

Application of proceeds of sale

6 The proceeds of sale shall be applied first in payment of the cost of transporting the grain to market as provided in section 4(2), and next in payment of the price or remuneration for threshing or cutting and threshing, and the residue, if any, shall be paid forthwith to the owner of the grain or his assigns.

Enforcement of lien

7 When a lienholder or his agent is unable to obtain peaceable possession of any grain that he is entitled to take by virtue of his lien and this Act, he may proceed to enforce his lien by distress.

Statement of thresher to lienholder

8(1) A person who has on any grain a valid and subsisting lien or charge other than a lien created by this Act is, on furnishing evidence of his lien or charge to

the person who has threshed or cut and threshed the grain, entitled to a statement setting forth

(a) the number of bushels of grain threshed or cut and threshed,

(b) the kind of grain, and

(c) the price per bushel or per acre charged for threshing or for cutting and threshing, or the rate per hour and the number of hours or the rate per day and the number of days for which payment is claimed in respect of the grain.

(2) The Minister of Municipal Affairs or the Minister of Forestry, Lands and Wildlife, or any of the authorized representatives of either of them, any municipal district or any of its authorized representatives is entitled, on the service of a demand in writing within 6 months after the date of the threshing of any grain, to a statement or statutory declaration from the person who has threshed or cut and threshed the grain, setting forth

(a) the number of bushels of grain threshed or cut and threshed,

(b) the kind of grain, and

(c) the price per bushel or per acre charged for threshing or for cutting and threshing, or the rate per hour and the number of hours or the rate per day and the number of days for which payment is claimed in respect of the grain.

(3) If the thresher refuses or neglects to give the statement or statutory declaration within 7 days after he receives the written demand therefor, he is guilty of an offence and liable to a fine of $5 for every day during which the default continues.

WAREHOUSEMEN'S LIEN ACT

CHAPTER W-3

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions
1 In this Act,

(a) "goods" includes personal property of every description that may be deposited with a warehouseman as bailee;

(a.1) "security interest" means an interest in goods that secures payment or performance of an obligation;

(b) "warehouseman" means a person lawfully engaged in the business of storing goods as a bailee for hire.

Method of giving notices
2 Where by this Act any notice in writing is required to be given, the notice shall be given

(a) by delivering it to the person to whom it is to be given, or

(b) by mailing it in the post office, postage paid and registered, addressed to him at his last known address.

Declaration of warehouseman's lien
3 Subject to section 5, every warehouseman has a lien on goods deposited with him for storage

(a) by the owner of the goods or by the authority of the owner, or

(b) by any person entrusted with the possession of the goods by the owner or by the authority of the owner.

Charges covered by lien
4 The lien is for the amount of the warehouseman's charges, that is to say,

(a) for all lawful charges for storage and preservation of the goods,

(b) for all lawful claims for money advanced, interest, insurance, transportation, labour, weighing, coopering and other expenses in relation to the goods, and

(c) for all reasonable charges for any notice required to be given under this Act, and for notice and advertisement of sale, and for sale of goods if default is made in satisfying the warehouseman's lien.

Where notice of lien given by warehouseman

5(1) Where the goods on which a lien exists were deposited not by the owner nor by his authority but by a person entrusted by the owner or by his authority with the possession of the goods, the warehouseman shall, within 2 months after the date of the deposit, give notice of the lien to

(a) the owner of the goods, and

(b) any person who has a security interest in the goods where a financing statement is registered at the date of the deposit with respect to the security interest.

(2) The notice shall be in writing and shall contain

(a) a brief description of the goods,

(b) a statement showing the location of the warehouse where the goods are stored, the date of their deposit with the warehouseman and the name of the person by whom they were deposited, and

(c) a statement that a lien is claimed under this Act by the warehouseman in respect of the goods.

(3) If the warehouseman fails to give the notice required by this section, his lien, as against the person to whom he has failed to give notice, is void from the expiration of the period of 2 months from the date of the deposit of the goods.

Sale of goods

6(1) In addition to all other remedies provided by law for the enforcement of liens or for the recovery of warehouseman's charges, a warehouseman may sell by public auction, in the manner provided in this section, any goods on which he has a lien for charges that have become due.

(2) Written notice of his intention to sell shall be given by the warehouseman

(a) to the person liable as debtor for the charges for which the lien exists,

(b) to the owner of the goods and to any person who has a security interest in the goods where a financing statement is registered at the date of the deposit with respect to the security interest, and

(c) repealed 1988 cP-4.05 s100,

(d) to any other person known by the warehouseman to have or claim an interest in the goods.

(3) The notice shall contain

(a) a brief description of the goods,

(b) a statement showing the location of the warehouse where the goods are stored, the date of their deposit with the warehouseman and the name of the person by whom they were deposited,

(c) an itemized statement of the warehouseman's charges showing the sum due at the time of the notice,

(d) a demand that the amount of the charges as stated in the notice and any further charges that accrue be paid on or before a day mentioned, not being less than 21 days

(i) from the delivery of the notice if it is personally delivered, or

(ii) from the time when the notice should reach its destination according to the due course of mail if it is sent by mail,

and

(e) a statement that unless the charges are paid within the time mentioned the goods will be advertised for sale and sold by public auction at a time and place specified in the notice.

(4) If the warehouseman's charges are not paid on or before the day mentioned in the notice, an advertisement of the sale

(a) describing the goods to be sold,

(b) stating the name of the person liable as debtor for the charges for which the lien exists, and

(c) stating the time and place of the sale,

shall be published at least once a week for 2 consecutive weeks in a newspaper published in Alberta and circulating in the locality where the sale is to be held.

(5) The sale shall be held not less than 14 days from the date of the first publication of the advertisement.

Unessential irregularities in notices

7 When a notice of lien under section 5 or a notice of intention to sell under section 6 has been given, but those provisions have not been strictly complied with, if the court before whom any question respecting the notice is tried or inquired into considers

(a) that the provisions have been substantially complied with, or

(b) that it would be inequitable that the lien or sale be avoided by reason of the non-compliance,

no objection to the sufficiency of the notice shall in any such case be allowed to prevail so as to release or discharge the goods from the lien or vitiate the sale.

Disposition of proceeds of sale

8(1) From the proceeds of the sale the warehouseman shall satisfy his lien and shall pay over the surplus, if any, to the person entitled thereto.

(2) The warehouseman shall, when paying over the surplus, deliver to the person to whom he pays it a statement of account showing how the amount has been computed.

(3) If the surplus is not within 10 days after the sale demanded by the person entitled thereto, or if there are different claimants or the rights to the surplus are uncertain, the warehouseman shall on the order of a judge pay the surplus into the Court of Queen's Bench.

(4) The order may be made ex parte on any terms and conditions as to costs and otherwise that the judge may direct, and may provide to what fund or name the amount of the surplus is to be credited.

(5) At the time of paying the amount of the surplus into court the warehouseman shall file in court a copy of the statement of account showing how the amount has been computed.

Payment before sale of goods

9(1) At any time before the goods are sold, any person claiming an interest or right of possession in the goods may pay the warehouseman the amount necessary to satisfy his lien, including the expenses incurred in serving the notices and the advertisement and in preparing for the sale up to the time of the payment.

(2) The warehouseman shall deliver the goods to the person making the payment if that person is the person entitled to the possession of the goods on payment of the warehouseman's charges thereon, otherwise the warehouseman shall retain possession of the goods according to the terms of the contract of deposit.

WOODMEN'S LIEN ACT

CHAPTER W-14

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions
1 In this Act,

(a) "judge" means a judge of the Court of Queen's Bench;

(b) "labour" and "services" include

(i) cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber,

(ii) any work done by any persons employed in any capacity in any lumbering or timber operations or in or about any timber limit or mill where lumber of any description is processed,

(iii) any work done by cooks, blacksmiths, artisans and others usually employed in connection therewith, whether performed by wage-earners or others, and

(iv) also the supply of articles of food to any person entering into a contract as set out in section 3 while engaged in the performing of the contract;

(c) "logs" and "timber" include logs, timber, poles, ties, bolts, staves, posts, tanbark, wood and lumber.

Payments Under Timber Contracts

Payments under timber contracts
2(1) Every person entering into a contract, engagement or agreement with any other person for the purpose of furnishing, supplying or obtaining timber or logs, by which it is requisite or necessary to engage and employ workmen and labourers in the obtaining, supplying and furnishing of the logs or timber shall, before making any payment under or in respect of the contract, engagement or agreement, of any sum of money, or in kind, require the person to whom payment is to be made to produce and furnish a payroll of the wages and amounts due and owing and of the payment thereof, or if no payment has been made, the amount of wages or pay due and owing to all the workmen or labourers employed or engaged on or under the contract, engagement or

agreement, at the time when the logs or timber are delivered or taken in charge for or by or on behalf of the persons so making payment and receiving the timber or logs.

(2) The payroll may be in the prescribed form.

Production of receipted payroll

3 Any person making any payment under a contract, engagement or agreement without requiring the production of the payroll as mentioned in section 2 is liable at the suit of any workman or labourer so engaged under the contract, engagement or agreement for the amount of wages or pay due and owing to the workman or labourer under the contract, engagement or agreement.

Retention of sums due to workmen

4 The person to whom the payroll is given shall, for the use of the labourers or workmen whose names are set out in the payroll, retain the sums that are set out opposite their respective names and that have not been paid, and the receipt or receipts of those labourers or workmen is sufficient discharge therefor.

Nature, Contents and Filing of Lien

Lien on logs or timber

5(1) In this section "person" includes clerks, timekeepers, storekeepers, cooks, blacksmiths, artisans and all others usually employed in connection with the labour or services.

(2) Any person performing any labour or services in connection with any logs or timber within Alberta, other than lumber, has, for the amount due to him for that labour, or services, a lien on

(a) any logs or timber in respect of which the labour or services were rendered,

(b) any other logs that belong to the same owner and that have been mixed with any of the logs or timber in respect of which the labour or services were rendered, and

(c) any lumber made out of any of those logs or timber, so long as the lumber has not been sold to and fully paid for by a bona fide purchaser for value without notice of the lien.

(3) Notwithstanding subsection (2)(c), if the lumber is in the possession of a bona fide purchaser for value who purchased without notice of the lien, the lien created by subsection (2) shall not exceed the amount unpaid for the lumber by the purchaser at the date he received notice of the lien.

(4) The lien is a first lien or charge on the logs, timber and lumber and has precedence over all other claims or liens thereon, except only claims of the Crown for dues or charges.

Waiver on lien

6 Any provision in a contract or agreement purporting to deprive any person of the lien under section 5 is void.

Lien remaining charge on logs

7(1) The lien provided for in section 5 does not remain a charge on the logs, timber or lumber, unless

(a) a statement of it in writing, verified on oath by the person claiming the lien or someone authorized on his behalf and bearing endorsed thereon the name and address of the claimant or his solicitor, is filed in the office of the clerk of the Court of Queen's Bench of the judicial district in which the labour or services or some part thereof have been performed, and

(b) a copy of the statement is served on the person alleged to be liable for the payment of the claim, and if that person is not the owner of the logs, timber or lumber, then a copy of the statement is also served on the owner of the logs, timber or lumber or on the agent or persons in whose possession, custody or control they may be found.

(2) When the labour or services have been performed on any logs or timber taken out to be run down, or run down, any of the rivers or streams within or partly within Alberta, the statement may, at the option of the claimant, be filed in the office of the clerk of the Court of Queen's Bench of the judicial district wherein the drive terminates or reaches its destination.

Statement of claim

8 The statement shall set out briefly the nature of the debt, demand or claim, the amount due to the claimant, as near as may be, over and above all legal set-offs or counterclaims, and a description of the logs, timber or lumber on or against which the lien is claimed, and may be in the prescribed form.

Filing statement of claim

9(1) If the labour or services are performed between October 1 and June 1 next thereafter, the statement of claim shall be filed on or before June 30, but if the labour or services are done or performed on or after June 1 and before October 1 in any year, then the statement shall be filed within 30 days after the last day the labour or services were performed.

(2) A mortgage, sale or transfer of the logs, timber or lumber on which a lien exists under this Act made

(a) during the time limited for the filing of the statement of claim and previous to its filing, or

(b) after its filing and during the time limited for the enforcement thereof,

in no way affects the lien, but the lien remains and is in force against the logs, timber or lumber, no matter in whose possession they are found.

Enforcement of Lien

Enforcement of lien

10(1) Any person having a lien on or against any logs, timber or lumber under this Act may enforce it by the regular practice and procedure of the Court of Queen's Bench in the district within which the logs, timber or lumber, or any part thereof, may be situated at the time of the commencement of the suit.

(2) The suit may be commenced to enforce the lien immediately after the filing of the statement, if the amount thereof is due, or, if credit has been given, immediately after the expiry of the period of credit.

(3) The lien ceases to be a lien on the property named in the statement, unless proceedings to enforce it are commenced within 30 days after the filing of the statement of claim or within 30 days of the expiry of the period of credit, as the case may be.

(4) In the suit the person liable for the payment of the debt or claim shall be made a party defendant.

Summary disposal of cases

11 In any proceeding whether commenced by service of statement of claim or otherwise, a judge may order that it be disposed of summarily in chambers, on any terms as to notice and otherwise as the order provides, and the proceeding may be so heard and disposed of.

Application to set aside attachment, etc.

12 The judge may also entertain in chambers an application to set aside an attachment or seizure or to release logs or timber that have been seized, and may summarily dispose of the application.

Issue of attachment

13 When the amount of any claim filed is not less than $10, on the production and filing of a copy of the claim and affidavit, and of an affidavit made and sworn by the claimant as to the correctness of the amount of the claim due and owing, and showing that it has been filed in accordance with this Act, and stating

(a) that he has good reason to believe and does believe that

(i) the logs, timber or lumber on which he claims a lien are about to be removed out of Alberta,

(ii) the person indebted for the amount of the lien has absconded from Alberta with intent to defraud or defeat his creditors, or

(iii) the logs, timbers or lumber on which he claims a lien are about to be disposed of or dealt with in such a way that they cannot be identified,

and

(b) that he is in danger of losing his claim if an attachment does not issue,

and if an affidavit corroborating the affidavit of the plaintiff in respect of clause (a)(i), (ii) or (iii) is also filed, then the clerk of the Court within whose jurisdiction the logs, timber or lumber are, shall issue a writ of attachment, directed to the sheriff, commanding the sheriff to attach, seize, take and safely keep the logs, timber or lumber or a sufficient portion thereof to secure the sum mentioned in the writ and the costs of the suit and of the proceedings to enforce the lien, and to return the writ forthwith to the Court.

Second seizure

14 If additional claims are made or the amount of a claim is increased or a sufficient seizure has not been made, a 2nd or subsequent seizure may be made either under execution or attachment.

Service of writ of attachment

15(1) The writ of attachment shall also, when no statement of claim has issued, summon the defendant to enter an appearance in the Court, and a copy of the writ of attachment shall be served on the defendant.

(2) If the defendant in the attachment is not the owner of the logs, timber or lumber described in the writ of attachment then a copy of the writ shall also be served on the owner of the logs, timber or lumber, or on the agent or person in whose possession, custody or control they may be found for him.

(3) The owner may on his own application or by direction of a judge be made a party defendant at the trial.

Order allowing owner, etc., to defend

16 When the service has not been personal on either the defendant or owner, and when a proper defence has not been filed, a judge may in his discretion admit them or either of them to make full defence and may make any order as to service and otherwise in the premises that is reasonable and just to all parties.

Logs in transit by water

17 No sheriff shall seize or detain any logs or timber under this Act when in transit by water from the place where they were cut to the place of destination.

Restoration on execution of bond

18 In case of an attachment, if the owner of the logs, timber or lumber, or any other person in his behalf, executes and files with the clerk of the Court a good and sufficient bond to the person claiming the lien, executed by 2 sureties and

approved by the clerk and conditioned for the payment of all damages, costs, charges, disbursements and expenses that may be recovered by the claimant in the proceedings, together with the amount for which a lien is claimed in any other suit, if any, the clerk shall issue an order to the sheriff having in charge the logs, timber or lumber directing their release and on service of the order, he shall release them.

Notice of dispute

19 A person who has been served with a copy of the writ of attachment under this Act, and who desires to dispute it, shall, within 10 days after the service, file in the Court a statement of defence.

Judgment by default

20 If no statement of defence is filed under section 19, judgment may be entered as in the case of default, and the practice or procedure may be the same as in a suit begun by statement of claim.

Payment into court

21(1) The defendant may, at any time after service of the writ of attachment and before the sale of the logs, timber or lumber, pay into Court the amount for which a lien is claimed in the suit, together with the amount for which a lien is claimed in any other suit, if any, and together with costs of the proceedings thereon to the date of the payment taxed by the clerk of the Court if so required.

(2) The person making the payment is thereupon entitled to a certificate vacating the lien.

(3) On the certificate vacating the lien being filed with the clerk of the Court

(a) the lien is vacated and all further proceedings thereon shall cease, and

(b) the person making the payment is further entitled to an order directing the delivery up of the logs, timber or lumber seized under the attachment and the cancellation of any bond given under this Act.

Hearing parties, taking accounts, etc.

22 In any case commenced by writ of attachment, after the expiration of the time within which a statement of defence may be filed, if a statement of defence has been filed, the judge shall, in chambers as provided by section 11, or at the next sitting of the Court after due notice has been given to all parties to the suit and to all persons claiming liens on the logs, timber or lumber and whose liens are filed, or to their solicitors, hear all those parties and claimants, and take all accounts necessary to determine the amounts, if any, due to them or any of them or to any other holders of liens who may be called by the judge to prove their liens, and shall fix or cause to be taxed by the clerk their costs and determine by whom they are payable and settle their priorities and generally determine all

matters that may be necessary for the adjustment of the rights of the several parties.

Judge's report and order for payment

23 At the conclusion of the inquiry the judge shall make his report and order, which shall state his findings and direct the payment into Court of the amounts, if any, found due, and costs, within 8 days thereafter, and, in default of payment that the logs, timber or lumber be sold by the sheriff for the satisfaction of the amounts found due to the several parties on the inquiry, and costs.

Sale

24(1) In default of payment into Court under section 23 within the 8 days, the logs, timber or lumber shall within 20 days thereafter be sold by the sheriff, in the same manner and subject to the same law as goods and chattels seized or taken in execution, unless the judge directs that additional publicity be given to the sale.

(2) The amount realized by the sale shall, after deducting the expenses thereof payable to the sheriff, be paid into Court and shall on the application of the several parties found to be entitled thereto under the order of a judge, be paid out to them by the clerk of the Court.

(3) If the amount realized on the sale is not sufficient to pay the claims in full and costs, the judge shall apportion the amount realized pro rata among the different claimants.

Judgment and execution for unpaid balance

25(1) If, after the sale and distribution of the proceeds of it under section 24, any balance remains due to any person under the order of the judge, the clerk of the Court shall on the application of that person give to him a certificate that the amount remains due.

(2) The certificate may be entered as a judgment in the Court, against the person by whom the claim was directed to be paid, and execution may be issued thereupon as in the case of other judgments.

Discharge of liens where claims unfounded

26 When nothing is found due on the several claims filed under this Act or on the lien or liens in respect of which proceedings have been taken, the judge may direct by his order that the lien or liens be discharged and the logs, timber or lumber released or the security given for it be delivered up and cancelled, and shall also by his order direct payment forthwith of any costs that may be found due to the defendant or owner of the logs, timber or lumber.

Disposition of balance of money paid into court

27 When more money is paid into Court as the proceeds of the sale of logs, timber or lumber than is required to satisfy the lien or liens that have been proven and the interest and costs, the remaining money shall be paid over to the party entitled to it unless a judge otherwise orders.

Dismissal for want of prosecution

28 Any person affected by the proceedings taken under this Act may apply to a judge to dismiss the proceedings for want of prosecution, and the judge may make any order on the application as to costs or otherwise he considers just.

Adding parties

29 The judge may at any stage of the proceedings on the application of any party, or as he may see fit, order that any person who is considered a necessary party to the proceedings be added as a party or be served with any process or notice provided for by this Act, and the judge may make any order as to the costs of adding that person or as to service he considers just.

Saving of other remedies

30 Nothing in this Act disentitles any person to any remedy other than that afforded by this Act for the recovery of any amount due in respect of labour or services performed on or in connection with any logs, timber or lumber, and when a suit is brought to enforce a lien, but no lien is found to exist, judgment may be directed for the amount found due as in an ordinary case.

Lienholders may join in taking proceedings

31 Any number of lienholders may join whether by writ of attachment or otherwise in taking proceedings under this Act, or may assign their claims to any one or more persons, but the statement of claim shall include particular statements of the several claims of persons so joining.

Practice and costs

32 The practice and procedure and the tariff of costs of the Court of Queen's Bench apply, with all necessary modification, to proceedings under this Act.

Regulations

33 The Lieutenant Governor in Council may make regulations prescribing forms for the purposes of this Act.